FCC 1.12/3:4/5

ROOM
SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY

Volume 4, No. 5, Pages 1965 to 2289,
February 27 - March 10, 1989.

D 61

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R.§1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 4 FCC Rcd 1 (1989)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Detroit Public Library

APR 24 1989

Depository Document

Federal Communications Commission Record

Volume 4
Issue 5

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities.....viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xiv

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....1965

Federal Communications Commission Record

Table of Cases
Volume 4
Issue 5

Case Name	Page
AMTEL Corporation	2148
AT&T - Proposed FTS 2000 Rates	2078
AT&T Communications	2047
AT&T Communications	2249
AT&T Communications	2231
AT&T Communications - Network Protection Capability	2103
Access Telecommunications Equipment and Services	2250
Addition of New Section 1.13	2092
Advisory Labeling of Communications Receivers	2085
Ameritech Operating Companies	2162
Basic Exchange Telecommunications Service	2224
BellSouth Telephone Companies	2049
BellSouth Telephone Company	2048
COMSAT General Corporation	1997
Centel Corporation	2241
Central Telephone Company Cost Allocation Manual	2203
Communications Satellite Corporation	1994
Community Broadcasting Co., Inc.	1986
Contel Telephone Cost Allocation Manual	2150
DLBS, Incorporated	1985
Definition of Cable Television System	2088
Delray Cellular Associates	2233
Digital Selective Calling Equipment	2030
Dubuque TV Limited Partnership	1999
Effects of New Broadcast Stations	2276
Exemptions from Radiotelegraph Requirements	2100
Fee Decisions of the Managing Director	2285
Fixed Service Technical Rules	2012
Flynn, John	2286
GTE Spacenet Corporation	2071
General Telephone Operating Companies	2205
Golden West Broadcasters	2097
Interstate/Intrastate Usage of Feature Group A and B	1966
Iowa Network Access Division	2201
Key Broadcasting Corporation	1984
Local Exchange Carrier Access Tariff Rate Levels	2168
MCC Communications	2079
MTS/WATS Market Structure - Average Schedule Cost	2218
MTS/WATS Market Structure - Equal Access Costs	2104
Measuring Electromagnetic Emmissions from Digital Devices	2113
Meet Point Billing	2163
Northeast Pennsylvania Cellular Telephone Company	2064

Case Name	Page
Pole Attachment Refund Interest Rates	2062
Policy Statement on Cross-Interest	2208
Portland Cellular Partnership	2050
Prescription of Percentages of Depreciation (ERRATUM)	2063
RAO Letter on Item Lists for Plant Accounts	1965
Random Selection Lottery	2256
Reexamination of Commission's Cross-Interest Policy	2035
Reorganization and Revision of Part 87 - Aviation Services	2271
Reorganization/Deregulation of Part 97 - Amateur Radio Services	1991
Revision of Part 21	2287
Rochester Telephone Corporation Cost Allocation Manual	2204
Saxton Steele Communications	2094
Security Alarm Devices	1981
Southwestern Bell Telephone Company	2236
Spanish International Communications Corporation	2153
TPI Transmission Services, Inc.	2246
Table of Allotments, FM, Altamont, OR	2280
Table of Allotments, FM, Anchorage, AK	2060
Table of Allotments, FM, Ashland, WI	2059
Table of Allotments, FM, Avon, CO	2029
Table of Allotments, FM, Basalt, CO	2283
Table of Allotments, FM, Baton Rouge, LA	2189
Table of Allotments, FM, Carthage, IL	2061
Table of Allotments, FM, Chandler, IN	2281
Table of Allotments, FM, Claremore and Locust Grove, OK	2181
Table of Allotments, FM, Coalinga, CA	2171
Table of Allotments, FM, Derby, Augusta and Herington, KS	2173
Table of Allotments, FM, Eufaula, AL	2284
Table of Allotments, FM, Fairbry, NE	2279
Table of Allotments, FM, Gray, GA	2187
Table of Allotments, FM, Hali'imaile, HI	2025
Table of Allotments, FM, Jennings, Erath, and Mamou, LA	2003
Table of Allotments, FM, La Grange and Greenville, GA	2169
Table of Allotments, FM, Lafayette, LA	2002
Table of Allotments, FM, Lanai City, HI	2026
Table of Allotments, FM, Los Banos, CA	2028
Table of Allotments, FM, Marlow, OK	2195
Table of Allotments, FM, Mecca, CA	2027
Table of Allotments, FM, Montour Falls, NY	2179
Table of Allotments, FM, Ocean Springs, MS	2058
Table of Allotments, FM, Port Matilda and Petersburg, PA	2193
Table of Allotments, FM, Pueblo, CO	2282
Table of Allotments, FM, Salem and Sioux Falls, SD	2198
Table of Allotments, FM, Vero Beach, FL	2184
Table of Allotments, FM, Walhalla, SC	2191
Table of Allotments, FM, Warner Robbins, GA	2175

Case Name	Page
Table of Allotments, FM, Zebulon and Montezuma, GA	2177
Technical Operations of TV Stations	2004
Telecommunications Research and Action Center	2157
Tulsa 23	2067
US West CEI Plan for Protocol Processing Services	2223
Universal Service Fund and Lifeline Assistance	2041
Warren Price Communications, Inc.	1992
Waterfront Communications Corp.	2084
Western Union Corporation and World Communications, Inc.	2219
Wisconsin Bell, Inc.	2238

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 4
Issue 5

Delegated Authority or FCC Number	Page
DA 89 - 128	2062
DA 89 - 137	2078
DA 89 - 141	2249
DA 89 - 164	1965
DA 89 - 168	2025
DA 89 - 169	2026
DA 89 - 170	2027
DA 89 - 171	2028
DA 89 - 172	2029
DA 89 - 194	1991
DA 89 - 195	2047
DA 89 - 200	2048
DA 89 - 201	2103
DA 89 - 202	2002
DA 89 - 203	2003
DA 89 - 205	2058
DA 89 - 206	2059
DA 89 - 207	2060
DA 89 - 208	2061
DA 89 - 209	2049
DA 89 - 210	1997
DA 89 - 213	2063
DA 89 - 214	2169
DA 89 - 215	2187
DA 89 - 216	2189
DA 89 - 217	2191
DA 89 - 218	2193
DA 89 - 219	2195
DA 89 - 220	2198
DA 89 - 221	2171
DA 89 - 222	2173
DA 89 - 223	2175
DA 89 - 224	2177
DA 89 - 225	2179
DA 89 - 226	2279
DA 89 - 227	2280
DA 89 - 229	2201
DA 89 - 230	2084
DA 89 - 231	2064
DA 89 - 233	2203
DA 89 - 234	2204
DA 89 - 236	2100
DA 89 - 237	2157
DA 89 - 238	2224
DA 89 - 239	2162
DA 89 - 240	2163
DA 89 - 241	2168
DA 89 - 242	2231
DA 89 - 243	2205
DA 89 - 246	2150
DA 89 - 247	2219
DA 89 - 248	2281
DA 89 - 250	2282
DA 89 - 252	2283
DA 89 - 253	2284
DA 89 - 258	2223
DA 89 - 259	2233
DA 89 - 260	2236
DA 89 - 261	2246
DA 89 - 262	2238
DA 89 - 263	2241
DA 89 - 265	2285
FCC 88 - 344	2208
FCC 88 - 345	2035
FCC 88 - 364	2041
FCC 88 - 424	2079
FCC 88J - 5	1966
FCC 89 - 12	2097
FCC 89 - 13	1999
FCC 89 - 16	2104
FCC 89 - 23	2148
FCC 89 - 28	2256
FCC 89 - 35	2094
FCC 89 - 37	2085
FCC 89 - 40	2088
FCC 89 - 43	2004
FCC 89 - 45	2012
FCC 89 - 48	2030
FCC 89 - 49	2271
FCC 89 - 50	1981
FCC 89 - 51	1994
FCC 89 - 52	2067

Delegated Authority or FCC Number	Page
FCC 89 - 53	2113
FCC 89 - 54	2218
FCC 89 - 55	2250
FCC 89 - 57	2092
FCC 89 - 58	1992
FCC 89 - 59	2050
FCC 89 - 61	2287
FCC 89 - 64	2184
FCC 89 - 66	2071
FCC 89 - 68	2181
FCC 89 - 73	2276
FCC 89 - 75	2153
FCC 89 - 80	2286
FCC 89D - 7	1986
FCC 89R - 5	1984
FCC 89R - 6	1985

Table of Cases by Docket Number
Volume 4
Issue 5

Docket Number				Page
CC	Dkt.No.78	-	72	2041
CC	Dkt.No.78	-	72	2104
CC	Dkt.No.78	-	72	2218
CC	Dkt.No.85	-	124	1966
CC	Dkt.No.86	-	128	2287
CC	Dkt.No.87	-	124	2250
CC	Dkt.No.87	-	579	2162
CC	Dkt.No.87	-	579	2163
CC	Dkt.No.88	-	136	2048
CC	Dkt.No.88	-	554	2168
GEN	Dkt.No.82	-	243	2012
GEN	Dkt.No.86	-	422	1981
GEN	Dkt.No.88	-	281	2085
GEN	Dkt.No.89	-	44	2113
MM	Dkt.No.83	-	540	2153
MM	Dkt.No.85	-	156	2181
MM	Dkt.No.85	-	331	1985
MM	Dkt.No.86	-	284	2184
MM	Dkt.No.87	-	68	2276
MM	Dkt.No.87	-	93	2179
MM	Dkt.No.87	-	104	2003
MM	Dkt.No.87	-	154	2035
MM	Dkt.No.87	-	154	2208
MM	Dkt.No.87	-	196	2002
MM	Dkt.No.87	-	231	1984
MM	Dkt.No.87	-	246	1992
MM	Dkt.No.87	-	580	1986
MM	Dkt.No.87	-	622	2282
MM	Dkt.No.88	-	23	2059
MM	Dkt.No.88	-	29	2060
MM	Dkt.No.88	-	109	2283
MM	Dkt.No.88	-	114	2004
MM	Dkt.No.88	-	147	2028
MM	Dkt.No.88	-	179	2284
MM	Dkt.No.88	-	184	2171
MM	Dkt.No.88	-	199	2279
MM	Dkt.No.88	-	231	2027
MM	Dkt.No.88	-	236	2061
MM	Dkt.No.88	-	253	2029
MM	Dkt.No.88	-	261	2280
MM	Dkt.No.88	-	268	2281
MM	Dkt.No.88	-	316	2026
MM	Dkt.No.88	-	322	2025
MM	Dkt.No.88	-	325	2058
MM	Dkt.No.89	-	15	2256
MM	Dkt.No.89	-	35	2088
MM	Dkt.No.89	-	47	2169
MM	Dkt.No.89	-	48	2187
MM	Dkt.No.89	-	49	2189
MM	Dkt.No.89	-	50	2191
MM	Dkt.No.89	-	52	2195
MM	Dkt.No.89	-	53	2198
MM	Dkt.No.89	-	54	2173
MM	Dkt.No.89	-	55	2175
MM	Dkt.No.89	-	56	2177
MM	Dkt.No.89	-	218	2193
PR	Dkt.No.87	-	214	2271
PR	Dkt.No.87	-	491	2030
PR	Dkt.No.88	-	139	1991

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 4
Issue 5

Rulemaking Number	Page
RM - 2573	2184
RM - 4938	2181
RM - 5403	2181
RM - 5425	2003
RM - 5492	2002
RM - 5612	2003
RM - 5632	2179
RM - 5725	2061
RM - 5798	2060
RM - 5808	2181
RM - 5836	2085
RM - 5844	2282
RM - 5952	2028
RM - 5957	2283
RM - 5989	2003
RM - 5990	2003
RM - 6034	2284
RM - 6106	2059
RM - 6116	2171
RM - 6131	2027
RM - 6141	2281
RM - 6162	2029
RM - 6267	2025
RM - 6269	2026
RM - 6306	2279
RM - 6316	2058
RM - 6339	2280
RM - 6541	2189
RM - 6576	2193
RM - 6588	2169
RM - 6589	2177
RM - 6591	2169
RM - 6592	2187
RM - 6593	2175
RM - 6613	2195
RM - 6614	2198
RM - 6615	2191
RM - 6634	2173
RM - 6644	2193

Table of Cases by City
Volume 4
Issue 5

City/State	Page	City/State	Page
Altamont, OR	2280	Julian, CA	2094
Anchorage, AK	2060	La Grange, GA	2169
Ashland, WI	2059	Lafayette, LA	2002
Augusta, KS	2173	Lanai City, HI	2026
Avon, CO	2029	Locust Grove, OK	2181
Barling, AR	2181	Los Banos, CA	2028
Basalt, CO	2283	Mamou, LA	2003
Baton Rouge, LA	2189	Marlow, OK	2195
Bay Shore, NY	1992	Maurice, LA	2003
Beaumont, TX	2233	Mecca, CA	2027
Brookfield, WI	2238	Montezuma, GA	2177
Carthage, IL	2061	Montour, NY	2179
Chandler, IN	2281	Nederland, TX	2003
Claremore, OK	2181	Nowata, OK	2181
Coalinga, CA	2171	Ocean Springs, MS	2058
Conroe, TX	1985	Petersburg, PA	2193
Derby, KS	2173	Port Matilda, PA	2193
Dubuque, IA	1999	Portland, ME	2050
Erath, LA	2003	Pueblo, CO	2282
Eufaula, AL	2284	Rogers, AR	2079
Fairbury, NE	2279	Salem, SD	2198
Fenwick Island, DE	1984	San Antonio, TX	2153
Glendale, CA	2097	Sioux Falls, SD	2198
Gray, GA	2187	Southbury, CT	1997
Greenville, GA	2169	Tulsa, OK	2067
Groves, TX	2003	Vero Beach, FL	2184
Hali'imaile, HI	2025	Walhalla, SC	2191
Herington, KS	2173	Warner Robbins, GA	2175
Jennings, LA	2003	Wiggins, MS	1986
		Zebulon, GA	2177

Subject Index
Volume 4
Issue 5

Subject	Page
Access Charges	
End users, computation of charges on	
Billing and collection service for any IXC carrier	2162
IXCs' use of local switching facilities: two catagories of servic	2104
Expenses, apportionment of	
Equal access expenses	2104
General information	
Common Line element, end user charges include	2104
Definitions	2104
Net investment, apportionment of	
Equal access equipment	2104
Adjudication	
Air hazard	1986
Civic participation	1986
Administrative Law Judge Decision	
Alien ownership	2153
Failure to prosecute	1992
Orders or Notices	
Programming, specialized	2256
Aviation Services	
Developmental operation	
Limitations on use	2271
Operating requirements	
Radiotelegraphy, operators of stations using	2271
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	2094
Conflicts in applications, agreement for removing	2153
Licenses and permits	
Multiple ownership of broadcast stations in the same service	2035, 2079
Records kept by stations	
Equal employment opportunity program	2067
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2002, 2003, 2027, 2028, 2189, 2191,

Subject	Page
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2198, 2181, 2059, 2060, 2171, 2173, 2282, 2283,
Distances between stations, minimum	2094
Interference	
Field strength data to determine service, collection of	2097
Technical requirements	
Antenna height and power requirements	2097
Coverage, prediction of	2097
Transmitter location	2097
Broadcasting - TV Stations	
Services	
Aural and visual transmitters, operation of	2004
Technical considerations	
Engineering charts	2004
Tranmission system requirements	2004
Transmitter location and antenna system	2079
Cable Television Service	
Markets and services	2088
Crossownership: limitation on cable company carrying a TV signal	2035
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	2201
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	1965, 2048,
General public information and inspection of records	
Records not routinely available for public inspection	2286
Common Carriers/Affiliates: Reports	
Depreciation rates, reports of proposed changes in	2063
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	2203, 2204,
Enhanced services (computer) and customer-premises equipment	2223, 2236

Subject	Page
Communications Act of 1934	
Common Carriers	
Accounts, records, memoranda,forms of; depreciation charges	2063, 2205,
Charges, schedules of	2103
Complaints to the commission	2246
Consolidation,acquisition and control of telephone companies	2246
Discrimination and preferences	2246
Extension of lines, certificate for	1997, 2219
Pole attachments, regulation of	2062
Service and charges	2157, 2246
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	2233, 2246
Procedural and Administrative provisions	
Reconsiderations of actions taken by Commission	2148
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	1994, 1997,
Construction permits	2071
License for radio communication or transmission of energy	2246
Licenses, limitation on holding and transfer of	2233
Scope of the act	
Applications of the act	2246
Domestic Public Fixed Radio Services	
Applications and licenses, processing	
Mutually exclusive applications	2012
Public notice period	2012
Multipoint distribution service	
Frequency interference	2287
Point-to-point microwave radio service	
Frequencies available for assignment	2012
Technical standards	
Antennas, directional	2012
Frequency tolerance for each transmitter authorized	2012
Transmitter power	2012
Maritime Services	
Technical standards for coast and ship stations	
Digital selective calling (DSC) equipment, requirements for	2030
Operational-Fixed Microwave Service, Private	
Requirements, general	
Frequencies, policies governing the assignment of	2084
Technical standards	
Frequencies available, tables of assignments of	2012

Subject	Page
Practice and Procedure	
Application procedures, general	
Information furnished by applicants, changes in	2094
Common carriers, general information	
Show cause orders	2163
Common carriers: complaints	
Formal or informal	2157
Common carriers: complaints, formal	
Cross complaints	2246
Common carriers: tariffs	
Filing, petitions related to new	2249
Information, general	
Declaratory rulings	2241
Time, computation of	2092, 2092
Mass media services: random selection	
Licenses/construction permits/major changes in facilities	2256
Pleadings, briefs	
Extension of time, motions for	1991
Pleadings and filing periods, provisions regarding	2078
Pole attachment (cable television) complaints: procedures	
Remedies	2062
Private radio services: processing of applications	
Public notice	2012
Proceedings, miscellaneous	
Forfeiture proceedings	2233
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	1992
Public Mobile Service	
Applications and licenses-filing requirements	
Forms and permissive changes or minor modifications	2064
Applications and licenses-processing	
Construction, time period allowed for	2233
Domestic public cellular radio telecommunications service	
Financial qualifications	2050
Service areas	2064
Radio Frequency Devices	
Lowpower specific devices: control and security alarms	
Technical standards	1981
Radio receivers	
Receiver, identification of a	2085, 2085

Subject	Page
Statutory Citations Other than Communications	
Administrative Procedure	
Information,public; agency rules, opinions, orders	2286
Tariffs (Schedules of Rates and Regulations)	
Rules, general	
Letters of transmittal: supporting information to be submitted	2103
Telecommunications Companies: Classes A and B	
Nonregulated activities	2205, 2150
Regulated accounts	2205, 2150
Transactions with affiliates	2205, 2150,
Terminal Equipment Connected to Network	
Registration procedures	
Notice of hearing aid compatibility, conspicuous	2250
Registration, conditions for	
Hearing aid compatibility, technical standards for	2250
Terminal equipment, conditions on use of	

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.047 C.F.R. 001.773(a)(2)(ii)	2249
000.047 C.F.R. 36.125, Meas. of FGA/FGB Access	1966
000.047 C.F.R. 69.116 - 69.117, Assessment of Charges for US	2041
000.047 CFR 064.702, Furnishing of Enhanced Services & CPE	2223
000.047 CFR 1.45 Pleadings; filing periods	2168
000.047 CFR Section 1.701 Show Cause Orders	2163
000.047 CFR §69.605(c)(1), Rpt. & Distribution of Pool Acce	2218
000.069 Access Charges	2201
000.204(a) lawfulness of new charges; suspension	2048
000.214 Extension of Lines	2201
000.291 authority delegated	2048
000.291 Delegated Authority	1965
000.291 Authority Delegated	2148
000.457(d) Records not routinely available for public inspec	2286
000.710 Telephone Service for the Disabled	2250
001.004 Computation of Time	2092
001.013 Filing of petitions for review and notices of appeal	2092
001.02 Declaratory rulings	2241
001.045(c) Pleadings; filing periods	2078
001.046 Motions for extension of time	1991
001.065 Substantial and significant changes in information f	2094
001.080 Forfeiture Proceedings	2233
001.115 Application for Review)	1992
001.1410 Remedies	2062
001.1601, Scope	2256
001.711 Informal or formal complaints	2157
001.728 Formal Complaints not stating a cause of action	2246
001.962. Public notice of acceptance for filing; petitions t	2012
015.071 Identification of a receiver.	2085
015.205 Technical Standards	1981
015.840 Computing Device test Procedures	2113
021.027. Public notice period.	2012
021.031. Mutually exclusive applications.	2012
021.038(b)(3) Assignment or transfer of station authorizatio	2287
021.041 Special processing of applications for minor mod.	2287
021.042 Modifications not requiring prior authorization	2287
021.101. Frequency tolerance.	2012
021.107. Transmitter power.	2012
021.108. Directional antennas.	2012
021.701. Frequencies.	2012
021.703. Bandwidth and emission limitations.	2012
021.902 Frequency interference	2287
022.009 Standard application forms and permissive changes or	2064
022.027. Public notice period.	2012
022.031. Mutually exclusive applications.	2012
022.043 Period of Construction	2233
022.101. Frequency tolerance.	2012
022.501. Frequencies.	2012
022.903 Cellular system service areas	2064
022.917 Demonstration of Financial Qualifications.	2050

022.921 Ownership in applications for cellular service for m 2050
032.004 Regulated Accounts 2205
032.014 Regulated Accounts 2150
032.023 Nonregulated Accounts 2150
032.023 Nonregulated Accounts 2205
032.027 Transactions With Affiliates 2150
032.027 Transactions With Affiliates 2205
032.027 Transactions with affiliates 2241
043.043 Reports of proposed changes in depreciation rates 2063
061.038 Supporting information to be submitted 2103
063.001 Content of Applications 2201
064.702, Furnishing of Enhanced Services & CPE 2236
064.901 Allocation of Costs 2150
064.901 Allocation of Costs 2203
064.901 Allocation of Costs 2204
064.901 Allocation of Costs 2205
068.004 Hearing Aid Compatibile Telephones 2250
068.112 Hearing Aid Compatibility 2250
068.224 Notice of Hearing-aid Compatibility 2250
068.316 Hearing-aid Compatibility: Technical Standards 2250
069.002 Definitions 2104
069.004 Charges to be filed 2104
069.107 Equal access 2104
069.114 Billing and Collection 2162
069.308 Equal access equipment 2104
069.410 Equal access expenses 2104
073.202 FM Table of Allotments 2002
073.202 FM Table of Allotments 2003
073.202 FM Table of Allotments 2025
073.202 FM Table of Allotments 2026
073.202 FM Table of Allotments 2027
073.202 FM Table of Allotments 2028
073.202 FM Table of Allotments 2029
073.202 FM Table of Allotments 2058
073.202 FM Table of Allotments 2059
073.202 FM Table of Allotments 2060
073.202 FM Table of Allotments 2061
073.202 FM Table of Allotments 2171
073.202 FM Table of Allotments 2173
073.202 FM Table of Allotments 2181
073.202 FM Table of Allotments 2184
073.202 FM Table of Allotments 2189
073.202 FM Table of Allotments 2281
073.202 FM Table of Allotments 2282
073.202 FM Table of Allotments 2283
073.202 FM Table of Allotments 2284
073.202, FM Table of Allotments 2169
073.202, FM Table of Allotments 2175
073.202, FM Table of Allotments 2177
073.202, FM Table of Allotments 2179
073.202, FM Table of Allotments 2187
073.202, FM Table of Allotments 2191
073.202, FM Table of Allotments 2193
073.202, FM Table of Allotments 2195

073.202, FM Table of Allotments 2198
073.202, FM Table of Allotments 2279
073.202, FM Table of Allotments 2280
073.207 Minimum distance separation between stations 2094
073.2080 Equal Employment Opportunity 2067
073.211 Power and antenna height requirements 2097
073.313 Prediction of coverage 2097
073.314 Field strength measurements 2097
073.315 FM transmitter location 2097
073.3522 Amendment of applications 2094
073.3525 Agreement for removing application conflicts 2153
073.3555 Multiple Ownership 2035
073.3555 Multiple Ownership 2079
073.653 Operation of TV aural and visual transmitters 2004
073.663 Determining operating power 2004
073.685 Maximum to Minimum Radiation Ratio 2079
073.687 Transmission system requirements 2004
073.699 TV engineering charts 2004
074.502. Frequency assignment. 2012
076.005 Definitions 2088
076.092 Stations entitled to network program nonduplication 1999
076.501 Cross-Ownership 2035
080.225 Requirements for digital selective calling (DSC) equ 2030
087.131 Power and emissions 2271
087.137 Types of emission 2271
087.145 Frequencies 2271
094.015(d) Policy governing the assignment of frequencies 2084
094.061. Applicability. 2012
094.065(e) Frequencies 2084
094.065. Frequencies. 2012
094.067. Frequency tolerance. 2012
094.071(b) Emission and bandwidth limitations 2084
094.071. Emission and bandwidth limitations. 2012
094.073. Power limitations. 2012
094.075. Antenna limitations. 2012
094.081 Authorization of microwave equipment 2084
200.214, Extension of lines 2071
300.034 Submarine Cables 2219
300.152 Application of Act 2246
300.201 Service and charges 2157
300.201 Service and Charges 2246
300.202 Discrimination and Preferences 2246
300.203 Schedule of Charges 2103
300.208 Complaints to the Commission 2246
300.209 Orders for Payment of Money 2246
300.214 Extension of Lines 1997
300.214 Extension of lines 2219
300.220 Accounts, Records, Memoranda, Depreciation Charges 2063
300.220 Accounts, Records, Memoranda; Depreciation Charges 2150
300.220 Accounts, Records, Memoranda; Depreciation Charges 2205
300.221 Special Provisions Relating to Telephone Companies 2246
300.224 Regulation of Pole Attachments 2062
300.301 License for Radio Communication 2246
300.309 Action in Authorization 1994

300.309 Action in Authorization 1997
300.309 Action upon applications 1999
300.309(i) Random selection procedure 2256
300.310(d) Limitation on holding and transfer of licenses 2233
300.319, Construction permits 2071
300.351 Ship Radio Stations and Operations 2100
300.405 Reconsiderations 2148
300.503 Forfeitures 2246
300.503 Forfeitures in cases of Rebates and Offsets 2233
300.522 Definitions 2088
300.634 Equal Employment Opportunity 2067
32.2001 Telecommunications plant in service 1965
32.2212 Digital electronic switching 1965
400.05552 Public Information; agency rules, opinions, orders 2286
400.405, Reconsiderations 2071
500.005 - Integration, Qualitative 1986
500.035 - Integration, Quantitative 1986
500.140 Comparative 2256
500.3110 Failure to Prosecute 1992
500.3150 Alien ownership 2153
Equal Access 2104
Part 63 Ext. of lines & Discontinuance of Svc by Carriers 2238

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO Letter 6

Revised: February 13, 1989; Released: February 27, 1989

Responsible Accounting Officers

Part 32, Uniform System of Accounts for Telecommunications Companies (USOA)-- Item Lists

Responsible Accounting Officer Letter No. 6 (RAO 6), issued June 26, 1987, contains a set of item lists for Telecommunications Plant in Service accounts in Part 32 of the Commission's rules. This RAO letter is issued for the purpose of amending the lists in RAO 6 as discussed below.

1. In a letter to the Chief, Accounting and Audits Division, dated September 30, 1988, Southwestern Bell Telephone requested that the item lists in RAO 6 be revised with respect to the classification of signal transfer points (STPs). The item lists in RAO 6 show STPs to be classifiable to Account 2232, Circuit Equipment. Southwestern Bell states, however, that STPs are packet switches that direct signaling messages among facilities in order to obtain and distribute switching instructions. As such, Southwestern Bell states that STPs should be included in Account 2212, Digital Electronic Switching. In addition, it claims that the elimination of STPs from the item list for Circuit Equipment and their addition to the list for Digital Electronic Switching will provide consistent accounting classification among companies subject to Part 32.

In a December 7, 1988 *ex parte* meeting in CC Docket 86-10, the United States Telephone Association (USTA) expressed "the local exchange carriers' consensus views" relative to this classification issue.[1] According to the discussion and the USTA filing on record in Docket 86-10, the local exchange carriers' consensus is, consistent with Southwestern Bell's, that STPs are classifiable to a switching account, specifically Account 2212.

Considering the views presented, we are including STPs in the item list for Account 2212 and, in the interest of uniformity in accounting for this item, deleting STPs from the list for Account 2232.

2. On July 22, 1988, the Commission amended the USOA to increase from 200 to 500 the limit for expensing specified individual items of equipment that, absent the expense limitation, would be recorded in certain plant accounts, including central office plant accounts.[2] Consistent with this change, the phrase "(Test equipment and tools which cost less than 200 . . . .)" in the item lists for the Central Office Asset Accounts [3] is hereby amended to read "(Test equipment and tools which cost less than 500 . . . .)".

This letter is issued under Section 0.291 of the Commission's rules. Application for review under Section 1.115 of the Commission's rules must be filed within 30 days from the date of public notice of this letter.

If you have any questions, contact John T. Curry or Hugh L. Boyle at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

FOOTNOTES

[1] *See* letter from Vice President-General Counsel, USTA to Secretary, FCC CC Docket No. 86-10, December 7, 1988.

[2] Revision to amend Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies as it relates to the treatment of certain individual items of furniture and equipment costing500 or less, *Report and Order*, CC Docket No. 87-135, 3 FCC Rcd 4464 (1988).

[3] Central Office Asset Accounts include Account 2211, Analog Electronic Switching, Account 2212, Digital Electronic Switching, Account 2215.1, Step-by-Step Switching, Account 2215.2, Crossbar Switching, Account 2215.3, Other Electro-Mechanical Switching, Account 2220, Operator Systems, Account 2231.1, Satellite and Earth Station Facilities, Account 2231.2, Other Radio Facilities, Account 2232, Circuit Equipment.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-124

In the Matter of

Determination of Interstate
and Intrastate Usage of
Feature Group A and
Feature Group B Access Service

RECOMMENDED DECISION AND ORDER

Adopted: December 22, 1988; Released: February 27, 1989

By the Federal-State Joint Board:

I. INTRODUCTION

1. This Joint Board was established by the Commission in April 1985[1] to develop a comprehensive solution to certain longstanding problems relating to the measurement and verification of interstate and intrastate usage of Feature Group A (FGA) and Feature Group B (FGB) access services by interexchange carriers (IXCs) for interstate and intrastate access charge billing and cost separations purposes. The Commission had previously stopped short of preemption and adopted interim procedures to deal with some of these problems, but determined that a more complete, uniform, and permanent solution should be developed through the Joint Board process.[2] Thus, the Commission issued a Notice of Proposed Rule Making establishing this Joint Board and soliciting the views and comments of interested parties on these matters. [3]

2. After reviewing the record, we present our recommendations on the issues relating to the jurisdictional allocation of FGA and FGB traffic for separations and billing purposes. First, we recommend that the Commission require use of the Entry/Exit Surrogate (EES) measurement method[4] to allocate FGA and FGB traffic between the interstate and intrastate jurisdictions for cost separations purposes. We recommend use of the EES method for this purpose because it has been successfully used to date to allocate these minutes, is reasonably accurate, and is relatively easy to implement and administer. Second, we recommend that the Commission authorize deviations from the EES method, but only in certain narrowly defined circumstances.[5] Third, because we believe that, to be consistent with Commission policy, the minutes attributed to the interstate jurisdiction should be identical for both cost assignment and recovery purposes, we recommend that the EES, or other authorized measurement method, be used not only for cost separations purposes but also for interstate access charge billing. We note further that the states and the LECs should use an intrastate billing approach that avoids the problems that could potentially occur if each jurisdiction billed for the same minutes of use. To the extent that states and the LECs use a per minute of use rate structure for intrastate access charge billing purposes, they should use the EES method, or a substitute method authorized pursuant to the procedures described in paragraph 61. Fourth, while we recognize the importance of avoiding onerous verification procedures in implementing this customer reporting approach, we are not persuaded that uniform, nationwide verification procedures need to be established.[6] We do, however, recommend certain basic guidelines in this area for consideration by the Commission and the states. We discuss each of these recommendations and the reasons for it in detail below.

II. BACKGROUND

3. As a rule, local exchange carriers (LECs) provide interstate switched access services pursuant to interstate tariffs filed with the Federal Communications Commission and provide their corresponding intrastate services through tariffs at the state level. With "premium" access services, Feature Groups C and D (FGC and FGD), which provide automatic number identification (ANI) capability,[7] jurisdictional usage is readily segretable for this purpose. However, with "non-premium" FGA and FGB access arrangements, which typically do not provide ANI capability, the LECs generally lack the technical ability to identify and measure jurisdictional usage.[8]

4. Yet, in order for concurrent federal and state tariffing to be applied in an orderly fashion to FGA and FGB access services, where both state and federal jurisdictions use a per minute of use rate structure and also rely on a jurisdictional allocation of usage for billing, the interstate and intrastate minutes of usage on those lines must be identified in some compatible way to permit LECs to assess their customers the proper access charges. Moreover, it is necessary to identify the jurisdictional split of this traffic in order to ensure, for cost separations purposes, that the cost of the facilities associated with carrying this traffic is properly allocated between the interstate and intrastate jurisdictions.

5. The only available sources of data bearing on the usage of these "unmeasurable" services are the call detail records maintained by the IXCs. These data reveal what portion of the traffic carried over FGA and FGB access lines without ANI enters the IXC network in the state in which the called station is situated and what portion is routed from the point of entry to a called station in a different state.[9] As a result, the LECs have used the traffic information the IXCs provide to determine jurisdictional usage. These measurement issues have been a matter of longstanding dispute between the LECs and IXCs, both as to the proper methods to be used by the IXCs to determine and report the jurisdictional nature of the calls based upon their call detail records, and the right of the LECs to verify and audit the jurisdictional usage actually reported. As more fully discussed below, these matters have previously been brought before the Commission in tariff proceedings, as well as by a Petition for Declaratory Ruling filed by MCI Telecommunications Corporation (MCI) which ultimately led to establishment of this Joint Board.[10]

III. HISTORY

6. In October 1983, the National Exchange Carrier Association (NECA) filed its first annual interstate access tariff, which included provisions for determining jurisdictional usage for access charge calculations for FGA and FGB. After rejecting this tariff[11] and revisions to it,[12] the Commission specified an interim procedure to be used for assessing interstate access charges on FGA and FGB traffic, and directed LECs to include that procedure in their tariffs until a better method could be devised.[13] Under this procedure, the customer, when ordering FGA and FGB access services, was to designate access lines for either intrastate or interstate use. The former were to be billed at intrastate rates and the latter at interstate rates.[14] Alternatively, the customer could allocate and report a percentage of interstate usage (PIU) to the LEC on the basis of actual usage measurements where they existed or could be reasonably approximated.

7. On September 11, 1984, MCI filed a petition asking the Commission to find that the *ECA Tariff Order* and the *April 27 Tariff Order*, which rejected the initial and revised access tariffs, had preempted state and local regulation of the manner of determining the intrastate switched access usage over FGA and FGB access lines for purposes of intrastate access charge calculation, and to direct the LECs to follow the procedures in NECA's tariff rather than inconsistent state tariff requirements.[15] MCI claimed that several states had prescribed or were considering prescribing methods of measuring intrastate access usage that differed sharply from the NECA provisions adopted pursuant to the Commission's direction in the *April 27 Tariff Order*. In particular, MCI objected to 1) the imposition of auditing requirements under state tariff, or as a condition of state certification, and 2) state prescription of the EES method for measuring intrastate usage. MCI also asked the Commission to approve, on an interim basis, the various "allocational factors" then being used by the IXCs to adjust their jurisdictional usage projections to account for the existence of "false" intrastate traffic,[16] pending establishment by the Commission of a uniform, nationwide allocation factor to apply until equal access conversion was complete.[17]

8. If the Commission did not agree with MCI's argument that the Commission had already preempted the states in this area, MCI presented three grounds for the Commission to take such preemptive action. First, MCI argued that because combined intrastate and interstate usage over these FGA and FGB access lines must add up to 100% of the total minutes over those lines, the state allocation of intrastate minutes necessarily had the effect of allocating interstate minutes. Thus, said MCI, the Commission's exclusive jurisdiction over interstate communications required that it, and not the states, decide how to allocate usage between the jurisdictions. Second, MCI claimed that due to the problem of false intrastate traffic, use of the EES method to estimate intrastate usage would result in the overstatement of intrastate traffic, and the understatement and misreporting of interstate traffic subject to federal jurisdiction alone. Third, MCI maintained that the state allocation methods and auditing requirements would impose significant burdens on the IXCs that would substantially and adversely affect their interstate operations; the expense and burden of litigating, implementing, and complying with a myriad of different state plans, MCI asserted, would be excessive and would impair the IXCs' ability to compete with AT&T during the critical transition to equal access.

9. In its *EES Order* ruling on the MCI petition, the Commission declined either to require the LECs to adhere to the procedures in NECA's switched access tariff for determining usage levels of intrastate FGA and FGB access services, or to prohibit the LECs and state authorities from imposing reasonable auditing or verification requirements as a condition of obtaining intrastate FGA and FGB access. The Commission found that the EES measurement procedures being used by many states were not unreasonable, and that in light of the then recent shift from a flat-rate to a usage-based rate structure for non-premium access services,[18] the EES method of jurisdictional determination appeared to be more appropriate and more accurate than the line allocation method reflected in the NECA access tariff. Accordingly, the Commission concluded that interstate usage for cost recovery purposes should, on an interim basis, be determined in accordance with the EES method, and directed the LECs to incorporate revisions to that effect in their interstate switched access tariff filings.[19]

10. The Commission recognized in the *EES Order* the legitimate interest of the states and LECs in assuring the accuracy of the IXC usage estimates, and concluded that it would not be unreasonable to permit the LECs to require that their IXC customers retain their call detail records from which the interstate and intrastate usage could be ascertained, and to make those records available as reasonably necessary for verification. At the same time, the Commission cautioned that it opposed verification requirements that were discriminatory, unduly burdensome, or intrusive on IXC operations. In addition, the Commission observed that LEC tariffs should provide for specific intervals of substantial duration between audits, such as, for example, annual intervals, rather than providing for audits upon the "reasonable" prior request of a LEC.[20]

11. The Commission also declined to approve IXC allocational factors to adjust for false intrastate traffic. It found that the amount of false intrastate traffic appeared to be relatively small, that the false intrastate traffic attributable to the lack of ANI would diminish with equal access, that the part of the false traffic problem attributable to "leaky" PBXs or private networks affected AT&T as well as the other IXCs, and that there had been no showing made that the amount of false intrastate traffic was not offset by an equal amount of false interstate traffic, *i.e.*, traffic that although jurisdictionally intrastate, is identified as interstate under the EES method.[21]

12. In conclusion, the Commission characterized its decision as a recommended interim solution to these traffic measurement problems, the success of which depended upon cooperation among the LECs, IXCs, and states. The Commission noted that, while it was not imposing any requirement on the states, if the states established divergent measurement or verification procedures that thwarted federal policy, it would be necessary to reconsider this decision. The Commission also recognized the need to develop, through the cooperative efforts of federal and state regulators, a permanent, comprehensive solution that would clearly and uniformly separate this access traffic between the respective jurisdictions.[22] This Joint Board was established to perform that task and to submit recommendations concerning this matter to the Commission.[23]

IV. SUMMARY OF COMMENTS

A. *Initial Order and Comments*

13. In our initial order inviting comments, we requested parties to address the access charge billing issues raised by the MCI petition and specifically asked for comments on the following points: 1) the relative merits of using the unadjusted EES measurement method (*i.e.*, unadjusted for false intrastate traffic) to determine interstate and intrastate traffic for FGA and FGB access charge billing purposes; 2) the availability of any other measurement approaches that would accurately reflect the amount of intrastate traffic; 3) the proper verification procedures to be used by LECs and state authorities to confirm the IXCs' measurements of interstate traffic; and 4) documentation of the relative levels of false intrastate and false interstate traffic. This section summarizes the comments and replies filed in response to this request.[24]

1. *Methods of Measurement of Jurisdictional Usage*

a. *LECs*

14. In general, the LECs favor use of the EES measurement method, unadjusted for false intrastate traffic, because it is uniform, easy to apply, and is reasonably accurate. Some of the LECs would, however, permit adjustments to the EES results if such an adjustment can be easily implemented and can be shown to reflect more accurately the jurisdictional flow of traffic in a particular area.

15. NYNEX Telephone Companies (NYNEX) supports the EES method, and opposes any modification of it since, it contends, no party has proposed any credible alternative or adjustment to the EES method based on measurable data, or provided any evidence to demonstrate that the amount of false intrastate traffic exceeds the amount of false interstate traffic. NYNEX further contends that, in any event, the amount of false traffic of any kind is relatively small, and to the extent it is attributable to the lack of ANI, the availability of equal access will reduce the problem. Because it considers the use of measurable extry/exit data preferable to the use of arbitrarily adjusted or non-measurable data, NYNEX urges us to recommend nationwide use of the unadjusted EES method. Bell Atlantic Telephone Companies (Bell Atlantic) also supports use of an unadjusted EES measurement approach because it is reasonably accurate and easily verifiable from existing call detail. In Bell Atlantic's view, a more precise method should be used only if it is as readily implementable and verifiable as the EES approach, but results in more accurate traffic measurements.

16. Pacific Bell similarly favors adoption of an unadjusted EES method of measurement, arguing that while IXCs generally have computer programs developed for billing purposes which analyze their call detail information according to points of network entry and exit, there is no objective basis on which to develop any factor to adjust for false intrastate traffic; the amount of false traffic is not only unmeasurable, but also varies among locations and IXCs depending upon geography, population, and network characteristics. Pacific Bell also claims that the small amount of false intrastate traffic will diminish with the availability of equal access and ANI capability, and that it would be unfair to adjust for false intrastate traffic without also adjusting for false interstate traffic. Mountain States Telephone & Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (collectively, U S West), in supporting the unadjusted EES approach, states that in light of the small and diminishing amount of false intrastate traffic and the existence of roughly offsetting false interstate traffic, the difficulties involved in trying to develop and apply adjustment factors outweigh any benefits that might result.

17. BellSouth Corporation (BellSouth) supports the unadjusted EES method because it recognizes that, while the IXCs are not able to identify the state of origin of calls which transit FGA or FGB access lines, they do have the information to determine the points at which such calls enter their networks and terminate. BellSouth urges that in the event an adjustment factor is allowed it must be easy to apply and verify.[25]

18. Ameritech Companies (Ameritech), Southwestern Bell Telephone Company (Southwestern Bell), and Southern New England Telephone Company (SNET) support use of the unadjusted EES method as the uniform starting point for jurisdictional measurement because that method is easily administered, verifiable, and reasonably accurate for most parts of the country. They urge, however, that local adjustments be permitted in certain circumstances. Because state regulators are most familiar with the state-to-state variations in traffic patterns, geography, and IXC operations that affect the relative levels of false interstate and intrastate usage in their individual states, these parties argue that uniform, nationwide, or other federally-mandated adjustment factor(s) should not be imposed. They urge instead that states be given the flexibility to allow the application of individualized adjustment factors in specific cases in which an IXC can provide studies and reports demonstrating the need for an adjustment at a given location, *i.e.*, an area with particularly high levels of false intrastate or interstate traffic.[26] Ameritech emphasizes that the burden should be on the IXC to provide the state regulators with evidence quantifying the level of false interstate and intrastate traffic that is sufficient to justify application of an adjustment.

19. Southwestern Bell offers two adjustment methods that, along with other reasonable approaches, a state should be able to apply when, in its discretion, it determines that an adjustment to the EES method is necessary. The first alternative would apply to traffic in certain Standard Metropolitan Statistical Areas (SMSA) that encompass more than one state. Under this approach, the amount of IXC traffic in an affected SMSA that is identified as intrastate under the EES method would be adjusted by a factor reflecting the relative percentage distribution of the population between the "border-straddling" areas. The second suggested alternative would identify a call as intrastate only if it is intrastate under the EES approach *and* the billing address of the IXC customer is also located in that state.[27]

20. United Telephone Systems, Inc. (UTS) favors use of the EES method, but would allow adjustments to the extent the IXCs can demonstrate that substantial inaccuracies would otherwise result. UTS urges, however, that any adjustments made should correct for false interstate as well as false intrastate traffic, should be specific to the IXC and state in question, and be updated at least annually.

21. The Iowa Telephone Association (ITA) states that the problem of identifying the jurisdictional nature of FGA traffic stems from two sources: 1) the lack of ANI capability for FGA and FGB, and 2) the "false" intrastate traffic problem that results from "leaky" PBXs or private lines. The leaky PBX problem, ITA suggests, is not unique to FGA or FGB type connections; therefore, any adjustment should apply to all switched access services. ITA proposes that carriers should choose from among a hierarchy of alternative measurement methods based upon the best information that is available for their specific exchange or locality, as listed below in order of preference: 1) actual jurisdictional usage data measured by the LECs; 2) actual usage data measured by the IXCs on a continuous basis; 3) actual usage data from LECs measured on a periodic sample basis; 4) actual usage data from IXCs measured on a periodic sample basis; and 5) the relative proportions of FGC and FGD traffic in the exchange, or smaller area, as a surrogate for the jurisdictional breakdown of FGA traffic.

22. The United States Telephone Association (USTA) states that the widespread support for continued use of the unadjusted EES method expressed by the commenters indicates that this Joint Board should report to the Commission that there is now no need to develop nationwide permanent measures for resolution of the access recovery issues raised by MCI. In contrast to this position, the National Telephone Cooperative Association (NTCA) and the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), in a joint filing urge that we undertake a broad inquiry into the jurisdictional separation of the costs associated with all access use of LEC facilities, and the recovery of these costs through the proper calculation and imposition of access charges. They propose a three point transition plan to address these problems in an integrated manner: 1) once equal access is implemented the LECs would be permitted to discontinue offering line-side and less than equal trunk-side, *i.e.*, equal access, connections; 2) the FCC would begin a comprehensive proceeding to consider the technical and operational network features that would provide the necessary jurisdictional and end-office measurement information for all calls; and 3) all LECs and IXCs would be required to participate in a nationwide data base designed to statistically track all traffic. While NTCA and OPASTCO believe their plan would eventually replace arbitrary measurement surrogates with verifiable data based upon actual measurements of traffic, they suggest that access charges in the interim should rely upon actual usage where that measurement capability exists, and the EES formula where it does not.

b. ***IXCs***

23. Like the LECs, the IXCs filing comments generally support adoption of the EES method on a permanent basis. They differ, however, over whether nationwide or local adjustment factors should be adopted. MCI, in contrast to its Petition for Declaratory Ruling, which initially raised this issue, now supports use of the unadjusted EES method on a permanent basis, concluding that it would be prohibitively costly to develop and implement more precise tools for measuring FGA and FGB access traffic, especially since the problem continues to decline in importance with equal access implementation. MCI now states that it is unable to determine the relative amounts of false intrastate and interstate traffic, and that any general or national corrective factors for the EES or other surrogates would necessarily rest on unprovable and problematic assumptions. MCI concludes that it is simpler and fairer to use the unadjusted EES method which relies on the major source of data available without ANI: the IXC's call detail information, which indicates where a call enters the IXC network and where it terminates.

24. GTE Sprint Communications Corp. (Sprint)[28] generally favors the EES method, but suggests two modifications for situations in which a LATA or major metropolitan area crosses state boundaries.[29] First, Sprint suggests that the billing address adjustment developed in Missouri for its border-straddling areas should be utilized in such situations.[30] Under this approach, the IXCs would inform the state commissions of those LATAs in which the billing adjustment is to be applied. Second, in areas with cross-border traffic where FGB, rather than FGA, access tandem connections connect the IXC network to the local network, Sprint proposes that the EES approach be replaced by actual jurisdictional measurement of traffic wherever possible. Since FGB access tandems make it possible to identify the trunk group on which a call originates, Sprint claims, if different FGB access tandem groups are dedicated to the different border states, it is possible to determine a call's point of origination with greater accuracy than the EES approach permits.[31]

25. AT&T also supports adoption of the EES as a permanent solution to the jurisdictional usage measurement problem because, while imperfect, it is a reasonably accurate method of apportionment that is readily verifiable from existing data. AT&T is opposed to use of either a uniform, nationwide adjustment to EES, which would ignore local conditions, or IXC-specific adjustments, which would introduce undue confusion. However, it believes that states should be given the flexibility to consider actual usage measurements or other data in place of the EES when there would result in greater accuracy. AT&T cites the Missouri "billing address adjustment" as an example of such a permissible refinement.

26. US Telecom, Inc. (US Telecom)[32] on the other hand, is opposed to permanent adoption of the unadjusted EES method, which, it claims, consistently results in the jurisdictional misallocation of traffic. US Telecom recommends instead that an industry-wide corrective factor to address the false intrastate traffic problem be developed through industry negotiations under the supervision of the Joint Board.

c. ***State Commissions***

27. The state commissions that filed comments generally support permanent adoption of the EES method of determining the jurisdictional usage of FGA and FGB access services. Some state commissions, however, urge that states be allowed, on an individual basis, to develop alternatives to the extent those alternatives are not unduly burdensome and would produce more accurate results.

28. State commissions that urge adoption of an unadjusted EES include the New York State Department of Public Service (New York), the California Public Utilities Commission (California), the Public Service Commission of Wyoming (Wyoming), and the New Jersey Board of Public Utilities (New Jersey). According to both New York and California, EES data is at present the only auditable and administratively practical means of determining the jurisdictional nature of the IXC services provided out of unconverted end offices. New York argues

that adjustments for false intrastate traffic are too difficult to achieve and would result in loss of effective regulatory oversight. New York also states that the EES method has the advantage of being consistent with the methods historically used both by industry and regulators to classify IXC traffic for jurisdictional purposes, and by the IXCs to bill their own customers. California states that until such time as the small amount of false intrastate traffic at issue can be reasonably identified or quantified -- permitting development of reasonable allocation factors -- traffic which appears to be intrastate should be treated as intrastate. Moreover, California contends that if intrastate usage is reduced by a certain percentage for access charge collection purposes, a similar usage adjustment should be made for cost separations purposes.

29. Wyoming and New Jersey favor use of an unadjusted EES because they believe that the levels of false intrastate and interstate traffic are likely to be offsetting, and that adjustment factors will not produce any greater accuracy. Wyoming expresses concern that IXCs would have both the ability and incentive to manipulate an allocation factor to understate intrastate traffic.[33]

30. State commissions favoring the EES, but willing to permit the use of adjustments or alternative methods include Illinois, Oklahoma, Pennsylvania, Missouri, and Kansas. The Illinois Commerce Commission (Illinois) views false intrastate traffic as an unavoidable anomaly. Although Illinois favors an unadjusted EES measurement, it would support state imposition of alternative methods, provided such methods allow easy and inexpensive correction for proven inaccuracies. Illinois also suggests that interstate and intrastate access charges should be set at comparable levels to eliminate IXC incentive to misreport the jurisdiction of their traffic.[34]

31. The Oklahoma Corporation Commission (Oklahoma), Pennsylvania Public Utility Commission (Pennsylvania), Missouri Public Service Commission (Missouri), and Kansas Corporation Commission (Kansas) support use of the EES measurement method, but would permit states to make adjustments in those areas where it is proven there is a particular likelihood the EES method will yield inaccurate results and a more accurate method is available. Pennsylvania recommends preparation of traffic inventories and studies for those areas which are most susceptible to false reporting to enable such adjustments to be made. Missouri opposes the use of national adjustment factors and recommends adoption of the unadjusted EES, with discretion to make adjustments where necessary to better reflect actual usage permitted in all states or at least in those states with major metropolitan areas crossing state borders. In particular, Missouri offers the EES adjustment it has implemented on an interim basis -- the SMSA population adjustment based upon the split of the SMSA population between the two states, and the adjustment it is developing and will require on a permanent basis -- the billing address adjustment based upon the IXC customer's billing address.[35] These adjustments, it asserts, more accurately reflect actual usage in border-straddling areas. Kansas, which oversees a state whose single LATA crosses over into Missouri, endorses the EES adjustments set forth by Missouri, and recommends that such methods be used in similar situations elsewhere.

32. The Virginia Corporation Commission (Virginia) proposes discontinuing use of the EES method because it does not believe it is accurate enough to justify the expenses involved in verifying its use. In its place, Virginia proposes that where more accurate estimates are not available, LECs should be allowed to compute access charges for their FGA and FGB service by assuming an intrastate/interstate ratio equal to that obtained from all other measured access traffic in the same area where the FGA or FGB services are being provided.

2. *Verification and Auditing Requirements*

a. *LECs*

33. The LECs emphasize the importance of establishing verification and auditing requirements to ensure that the IXCs accurately measure and report the jurisdictional nature of their traffic, and stress that unless these measures are adequate, whatever methods are established to measure jurisdictional usage will be meaningless. Southwestern Bell states that it should have the right to verify IXC jurisdictional reporting as often as the reports are provided -- typically in quarterly PIU updates -- and to examine the underlying data. BellSouth suggests that annual audits would be sufficient unless an IXC were to report an intrastate allocation in one update period that represented more than a 10 percent change over its previously reported figures. In that event, BellSouth would require IXCs to make their records available as necessary for LEC inspection and verification upon "reasonable notice." U S West argues that the IXCs -- which have the information and billing records to do so -- should be required to develop a monthly report of the jurisdictional nature of their traffic, and submit it to each LEC that provides them FGA and FGB service. U S West would require the IXCs to: 1) retain the data underlying the PIU reports for a reasonable amount of time; and 2) permit LECs to audit that data on a reasonable basis. U S West also believes that each LEC's interstate access tariff should clearly establish the reporting, record retention, and auditing rights and responsibilities of all parties. U S West suggests, however, that states would, pursuant to their own authority apart from the decisions in this docket, still be free to impose additional requirements in these areas to further their own state regulatory goals,[36] as long as they do not unreasonably interfere with the Commission's authority.

34. NYNEX claims that the verification procedures incorporated in Section 2.3.14(B) of its interstate access tariffs, in accordance with the Commission's direction in the *EES Order*, achieve the balancing of interests necessary to establish the accuracy of the reported allocation without unreasonably burdening the IXCs. That section directs the IXC to retain the call detail records from which the PIU was determined, and provides that if a billing dispute arises or a regulatory commission questions the PIU, the IXC will make that data available as reasonably necessary for purposes of verifying its PIU within 15 days of the telephone company's request. Such requests for supporting data, however, may not be made more than once each year. NYNEX also expresses a willingness to consider and discuss with interested customers the use of independent audits by third parties as an alternative verification procedure, provided appropriate guidelines for such audits can be established.

35. Pacific Bell recommends that the LECs, IXCs, and state regulators jointly develop verification procedures to balance the LECs' need to verify against the IXCs' desire to avoid unnecessary burdens. Pacific Bell endorses the approach adopted by California under which each IXC's

PIU undergoes an initial review to serve as the basis for reporting in later years. If the IXC so requests, and agrees to share the cost with the LECs providing the IXC access service, this audit may be conducted by an independent consultant. If a LEC disputes the reasonableness of the PIU or a regulatory commission questions the projected intrastate percentage, the LEC has the right to conduct an audit, but only after allowing the IXC an opportunity to request the state commission to resolve the dispute. The IXC is required to retain the billing tapes used to calculate a PIU for at least six months after its report to the LEC, and the LEC cannot request a PIU audit after that six-month period expires. Furthermore, the scope of the LEC audit is expressly limited to the billing tapes used to calculate the PIU and the materials needed to examine those billing tapes.

36. Bell Atlantic urges that audits be limited to a maximum of once each quarter and be restricted to the inspection of data that are reasonably necessary to verify the reported PIUs. Bell Atlantic is not opposed to the use of independent accounting firms to conduct these audits, provided the IXC pays the expense.

37. According to UTS, state commissions should have the authority to require, under proper circumstances, that the IXCs operating within their jurisdictions demonstrate the accuracy of their measurements of intrastate traffic. UTS believes that the recommendation issued in this proceeding should in no way diminish the right of state commissions, on their own motion or pursuant to a complaint, to audit or otherwise verify the jurisdictional reports of the IXCs within their borders.

38. As noted above, NTCA and OPASTCO propose a comprehensive solution to the traffic measurement problems that would require all LECs and IXCs to participate in a nationwide data base to track all traffic. These parties claim that such an approach would provide consistent verification data on the jurisdictional nature of access traffic and would thereby mitigate the many access billing disputes that have arisen in the past. For its part, USTA states that there is no need for promulgation of uniform federal rules governing verification. USTA notes that while there is some difference of opinion regarding the specifics of verification, all parties agree with the general principles that the LECs should not be obliged to accept the IXC's unsubstantiated figures, and that the IXCs should not be subject to an over-broad or burdensome verification scheme. USTA urges us to recommend that verification procedures continue to be established at the state level with the involvement of state regulatory authorities as necessary.

b. *IXCs*

39. While the IXCs do not object to the concept of auditing and verification, they generally contend that the provisions adopted by the LECs are too burdensome and intrusive. Thus, MCI asserts that many of the interstate switched access tariffs filed by the LECs in 1985 contain broad and burdensome auditing and verification provisions that violate the guidelines established by the Commission in its *EES Order*.[37] To remove any misunderstanding of the Commission's purpose in that order, MCI urges this Joint Board to recommend that the Commission clarify three points: 1) that the LECs do not need access to the IXC's actual call detail in order to verify the accuracy of their jurisdictional reports based on that data, and that instead, audits will suffice; 2) that auditing should not be permitted whenever the LEC disputes the reasonableness of a PIU, but should instead be restricted to specific intervals of substantial duration, such as a year; and 3) that the Commission should specify the conditions under which an audit can be conducted, and provide for a single nationwide annual audit for each IXC to be conducted by an independent certified accounting firm chosen and paid for by that IXC.[38] MCI also urges that these tariff provisions on jurisdictional reporting and auditing requirements be construed to apply to all similarly situated access customers, and not just to IXCs. Furthermore, to avoid any anticompetitive effects, MCI emphasizes that costly or burdensome requirements in this area must not be imposed.

40. In order to ensure that the IXCs are not subjected to repeated, unrestricted audits of the same reporting system, Sprint recommends that an independent auditor -- preferably the one which prepares the IXC's annual financial audits -- initially verify, pursuant to audit procedures developed for the industry, the IXC procedures used to develop jurisdictional reports. Use of an independent auditor would satisfy IXC concerns about competitor access to sensitive customer usage data. The auditor's report would be distributed to all LECs and state commissions, and IXC procedures would be subject to subsequent periodic verification by the independent auditor if the Joint Board and the Commission determined it to be necessary.[39]

41. US Telecom stresses that requiring the IXCs to submit to a myriad of different verification procedures would impose an unreasonable burden on interstate communications. US Telecom states that retention of call detail records for inspection is costly and burdensome to the IXCs, and that they should not be required to keep such information beyond one year. It also stresses the importance of including proprietary restrictions, such as provisions for independent auditors or nondisclosure agreements, in any verification scheme. US Telecom also contends that verification by the LECs is not appropriate since the power to investigate and punish false traffic reporting rests with the Commission under the Communications Act of 1934. In the event a reasonable showing is made to the state or federal commission that false reporting is occurring, those bodies, US Telecom contends, should exercise their powers to institute an appropriate investigation. The IXCs should not, says US Telecom, be forced to engage in expensive and burdensome audits on an arbitrary basis at the LECs' discretion.

42. AT&T does not recommend any specific verification procedures, but cautions against allowing IXCs to develop their own adjustment factors to the EES method, in part, because it would lead to the need for intrusive state audits.

c. *State Commissions*

43. Many of the state commissions did not offer specific recommendations on what verification or auditing procedures should be used. California states that while usage reporting based on IXC call detail records is on the whole very accurate, the LECs and regulators should not simply have to accept the IXCs' PIU figures at face value. California claims that the audit provisions it has adopted recognize this need to discourage misreporting as well as to satisfy the concerns expressed by the Commission in its earlier decisions that verification not be unduly burdensome. California says that rather than permitting intrusive

routine audits of IXC records, its rules allow auditing only in extreme circumstances where the LEC has shown good reason to do so. It also states that its rules afford protection for IXC proprietary information, and that any dispute between the LEC and IXC regarding either the right to audit, or what records or procedures that audit will involve, may be brought to the PUC for resolution.

44. Illinois believes the individual states, and not the Commission, should be responsible for developing methods of verification. However, it suggests the following procedure in the event a uniform audit scheme is adopted: an audit of IXC PIU estimates should be performed by an independent agent, which would analyze message samples taken from IXC message tapes and then either verify or challenge the reported PIU. The direct costs of the audit would be shared equally by the LECs and IXC. In the event of a dispute, the state commission would hold a hearing and order any necessary restitution. In states with intrastate carrier common line (CCL) charges below the interstate rates, the IXC would be permitted to refuse to submit to such an audit, but in this event it would be required to maintain the CCL charges at parity with the interstate levels.[40]

45. Missouri indicates that it is developing a data base to help verify the accuracy of IXC jurisdictional reports in its state based upon the billing address EES adjustment it has developed. Rather than prescribing audits at specific intervals, it proposes that an audit, to be paid for by the IXC, would be performed only when an IXC's quarterly usage report conflicts with this state data base. Missouri is not opposed to use of an independent auditor, but notes that the comments do not provide the criteria or procedures to be used by such an auditor, and recommends that further comments be solicited on this point. Missouri also urges the Joint Board to permit flexibility and not to prescribe specific intervals for auditing. Furthermore, Missouri indicates that if it, rather than an independent agent, were to conduct the audit, it would initiate an audit only when there are discrepancies in the quarterly usage reports, would protect the confidentiality of the IXC data, and would request only the records dating back to the previous audit.

46. Oklahoma states that it uses a statistically valid random sampling of IXC traffic data performed by an independent auditor to verify the IXCs' measurement of intrastate traffic. It believes this method to be both cost-effective and accurate. New Jersey generally urges that the LECs be permitted to retain the authority to verify the amount of the intrastate access usage that the IXCs report to them.

B. ***Supplemental Notice of Proposed Rule Making and Comments***

47. As noted, we were initially asked to develop a comprehensive solution to the measurement and distribution of FGA and FGB access minutes between the interstate and intrastate jurisdictions for access charge billing purposes. However, to the extent the jurisdictional allocation of the revenues associated with FGA and FGB service depends upon the distribution of these access minutes, the method of jurisdictional determination has implications for the jurisdictional assignment of the FGA and FGB service costs associated with those minutes as well. It is necessary to ensure that the relevant costs associated with these services are being properly allocated between the jurisdictions; otherwise the respective jurisdictions will be unable to determine whether the charges for FGA and FGB interstate access services are billed at rates that will recover the costs of the services. Indeed, in the *EES Order* the Commission noted the importance of the measurement of interstate and intrastate usage of FGA and FGB switched access service for purposes of "cost separation [under Part 36 of the Commission's Rules[41]] in order that revenue burdens may be equally distributed," as well as for access charge billing.[42]

48. Comments filed in response to the initial order inviting comments suggested that both the cost allocation and revenue recovery aspects of the jurisdictional measurement issue be addressed as part of any uniform, comprehensive solution to the problem of measurement of non-premium access service traffic. Subsequently, on December 9, 1986, the Commission issued a Supplemental Notice of Proposed Rule Making (*Supplemental NPRM*), which expanded the scope of this proceeding to include the jurisdictional separations issues and sought a recommendation from this Joint Board on those issues as well. Moreover, the Commission tentatively concluded in the *Supplemental NPRM* that whatever method is used to allocate the FGA and FGB traffic between jurisdictions for purposes of access charge billing should also be used for purposes of allocating the costs associated with providing FGA and FGB access services between the intrastate and interstate jurisdictions.

49. In the *Supplemental NPRM*, the Commission requested comment generally on the separations implications of the jurisdictional measurement of FGA and FGB traffic, and specifically asked LECs to describe the procedures they currently use to measure FGA and FGB traffic for separations purposes. In addition, the Commission urged parties 1) to recommend measurement methods that should be used for separations purposes, 2) to comment upon the Commission's tentative conclusion that the same measurement method should be used for both separations and access charge billing purposes, and 3) to recommend changes in the separations rules to reflect the proposed measurement techniques.

50. Fourteen parties, including twelve LECs and two IXCs, filed comments and reply comments.[43] The LECs, both BOCs and independent telephone companies, consistently report that they currently use the same measurement method to allocate FGA and FGB traffic between jurisdictions for cost separations purposes as they use for access charge billing. The LECs report that they presently bill FGA and FGB traffic as interstate or intrastate based upon the PIU reported to them by the IXCs, and assign costs for separations purposes based upon the same PIU.[44]

51. The commenting parties also agree with the Commission's tentative conclusion that the same measurement method -- and specifically, the unadjusted EES method[45] -- should be used for both separations and access charge billing purposes. AT&T endorses this approach because it would produce cost-causative allocations and an appropriate matching of jurisdictional costs and revenues. United Telecommunications, Inc. (UTI) agrees that consistency is necessary to enable the LECs to develop rate structures that support the goal of recovering costs from those who cause the costs. Bell Atlantic warns that inconsistent measurement methodologies for revenues and costs would distort the revenue/cost relationships in both the interstate and intrastate jurisdictions and result in anomalous FGA and FGB rates. U S West notes that use

of the same method for both billing and separations purposes for FGA and FGB services is, based on experience, relatively easy to administer.

52. Finally, the parties generally agree that if the Commission adopts a requirement that the EES measurement method should be used to determine the jurisdictional nature of FGA and FGB traffic for both access charge billing and cost separations purposes, no changes in the Part 36 separations rules would be necessary. According to the commenters, the present rules do not specify a particular measurement methodology for the jurisdictional determination of FGA and FGB traffic, but rather provide general guidelines. These guidelines, they contend, are sufficiently broad to permit the use of the EES method without modification. Indeed, the IXCs currently base their PIU reports to the LECs on the EES method and these reports are in turn used by most LECs to determine access minutes of use for separations purposes, consistent with the Part 36 Rules.

V. DISCUSSION

A. *The Entry/Exit Surrogate Method Should Be Used To Allocate FGA and FGB Traffic Between the Jurisdictions For Cost Separations Purposes*

53. The Commission in its *Supplemental NPRM* stated its view that both access charge billing and cost separations issues must be addressed in a comprehensive, uniform solution to the problem of jurisdictional measurement of non-premium access traffic. It noted that access charge billing and cost separations both depend upon the distribution of FGA and FGB traffic between the jurisdictions. Moreover, the Commission emphasized the importance of ensuring that costs are properly allocated between the jurisdictions so that the charges for FGA and FGB interstate access can be set in a way that will permit recovery of the costs associated with such services.

54. The commenters generally agree that a comprehensive solution to the jurisdictional measurement problem must include access charge billing and cost separations issues. Moreover, they generally endorse use of a consistent measurement method for both purposes. Indeed, the record reveals that this is the current practice: the LECs report that they now use the PIU, based on the EES method, reported to them by the IXCs, to allocate FGA and FGB access minutes for cost separations, as well as access charge billing, purposes.

55. We agree that a permanent solution to the FGA and FGB jurisdictional measurement problem must address the cost separations issues. Indeed, we believe that the question of proper separation of these costs is the threshold issue in this proceeding. Thus, at the outset, we recommend that the Commission adopt a uniform measurement methodology for jurisdictional allocation of FGA and FGB costs between the federal and state jurisdictions. This recommendation is compelled by established separations principles. In the absence of a uniform measurement method for cost separations purposes, a LEC could conceivably recover in both the interstate and intrastate jurisdictions for the same investment and expenses, or recover for them in neither. Such a result would violate the separations principle that the costs associated with a service allocated to both the federal and state jurisdictions add up to 100%, but no more than 100%, of the total costs being allocated.[46] Accordingly, we decline to adopt the proposals of certain parties to permit the states or the IXCs to elect any method they deem appropriate for certain geographic areas.

56. Specifically, we recommend that the Commission require use of the unadjusted EES method to allocate the costs associated with FGA and FGB access service between the jurisdictions for cost separations purposes. It is clear from the record in this proceeding that a proposed solution to the problem of jurisdictional measurement of FGA and FGB traffic for separations purposes must be evaluated in terms of the accuracy of the results it yields as well as the ease with which it can be implemented and administered. We agree with the vast majority of commenters that the unadjusted EES method is the best measurement method available under these criteria, and thus we recommend use of the unadjusted EES method to allocate the costs associated with FGA and FGB access service between the interstate and intrastate jurisdictions.[47] From a nationwide perspective there appears to be no more desirable alternative available.

57. As most commenters note, the volume of false intrastate traffic has not been quantified in this record in order to permit development of a reasonable adjustment factor. More importantly, it is not even clear, based on the record, that the EES method requires adjustment since there has been no showing that the incidence of false intrastate traffic exceeds the amount of false interstate traffic. In any event, we agree with the Commission that the amount of false FGA and FGB traffic that results from use of the unadjusted EES method is relatively small on a nationwide basis.[48] Moreover, the false traffic varies among locations and IXCs depending upon geography, population, and network characteristics. It is unlikely, therefore, that a nationwide adjustment factor of any kind would produce more accurate results since it would necessarily ignore these local conditions. Indeed, the instant record, like that in the *EES Order*, indicates that on a nationwide basis the EES method produces results preferable to those of any other method.

58. The relative accuracy of the unadjusted EES method is supported by the fact that it is the method that has been widely used successfully for the past several years. It was initially used by the states and was subsequently incorporated, pursuant to the *EES Order*, in the interstate access tariffs as an interim solution to the nationwide jurisdictional measurement problem. In addition, since the EES method is based upon the IXC's existing call detail information, it should be more accurate than alternatives that are based on unprovable assumptions about the nature of "false intrastate" traffic. Moreover, there is no indication that, based on actual experience, use of this method has resulted in any serious problems or inaccuracies.[49]

59. We also recommend the unadjusted EES method because it is relatively easy to implement and administer. While the IXCs do not, in many cases, have the means to identify the state of origin of calls that transit FGA or FGB access lines, they can, and readily do, determine the points at which such calls enter their networks and terminate. In particular, since IXCs use this "call detail" information for customer billing purposes, they generally have already developed the necessary equipment and computer programs needed to analyze the calls carried over their networks according to points of network entry and call termination. Thus, the information on which the EES

method is based is available to the IXCs at little or no additional cost. Implementation of the EES method is further simplified by the fact that it is already in use in most jurisdictions. Development and implementation of more precise and comprehensive methods for measuring FGA and FGB access traffic, such as the broad-based, elaborate proposals advocated by NTCA and OPASTCO.[50] would be unnecessarily costly and appear to go beyond the scope of this proceeding.

60. For the reasons set forth above, we conclude that the unadjusted EES measurement method is the best available technique for jurisdictional determination of FGA and FGB traffic for cost separations purposes. However, we recognize that the EES method may produce undesirable anomolies in certain areas of the country. For example, there may be certain limited areas with particularly high levels of "false" traffic, where minor adjustments or even alternatives to the EES technique could produce more accurate results without substantial drawbacks. Although we do not believe there is a need to establish nationwide adjustment factors to the EES method, there may be a limited number of areas, *e.g.*, certain cross-border areas, where EES adjustments or even other surrogate measurement methods may improve the accuracy of the jurisdictional determination without sacrificing ease of administration or the benefits of uniformity.[51] Accordingly, we recommend that deviations from or adjustments to the EES method for jurisdictional cost separations purposes be permitted in certain limited situations.

61. We recommend that this limited flexibility be granted pursuant to certain procedures and conditions. First, any carrier proposing a modification to the EES approach for jurisdictional cost separations must receive approval of the proposed substitute from the relevant state commission(s). Second, the carrier must obtain approval of the substitute method from the Commission.[52] To obtain this approval, the carrier must demonstrate to the Commission, in a filing supported by adequate data, that the following conditions have been satisfied:

a) the proposed alternative is in response to specific conditions under which the EES method can be shown to yield a significant degree of traffic misclassification;

b) the proposed alternative can be shown to yield significantly more accurate results than the unadjusted EES method;

c) the proposed alternative is as easy to implement and verify as the EES method or, if there are additional administrative or cost burdens, the added degree of accuracy justifies imposing such burdens;[53]

d) the proposed alternative is consistent with the "relative use" requirement of the relevant cost separations provision in Part 36 of the Commission's Rules;[54] and

e) any coordination with neighboring states that may be necessary to ensure that FGA and FGB traffic in those states is not being misclassified as a result of the proposed alternative, has been accomplished.[55]

62. In our view, the implementation of the EES method, with any approved exceptions, does not require changes in the language of the relevant Part 36 rules. Those rules require allocation of these costs based on relative use.[56] We find that the EES surrogate is consistent with this requirement, and any localized substitute methods authorized must also be found to be consistent with this principle. Accordingly, we do not offer language changes to the Part 36 Rules to accompany this recommended decision.

B. *The EES Method Should Also Be Used For Access Charge Billing Purposes*

63. In the *Supplemental NPRM*, the Commission tentatively concluded that the same method used to allocate FGA and FGB traffic between jurisdictions for purposes of access charge billing should also be used for purposes of allocating the costs associated with providing FGA and FGB access services between the intrastate and interstate jurisdictions.[57]

64. The commenters responding to the *Supplemental NPRM* uniformly endorse the Commission's proposal. They favor such a rule because it results in an appropriate matching of jurisdictional costs and revenues. In addition, some argue, such consistency is necessary to enable the LECs to develop rate structures that support the Commission's goal of recovering costs from those who cause the costs. Inconsistent methodologies, they assert, would distort the revenue/cost relationship and cause anomolies in FGA and FGB rates.

65. As the Commission concluded in the *EES Order* and the *Supplemental NPRM*, the method of determining jurisdictional allocation of FGA and FGB access minutes can affect both revenue recovery and the assignment of costs of those services. Thus, any comprehensive and permanent resolution of the measurement issue must include consideration of both jurisdictional costs and revenues.

66. Consistent with Commission policy, the interstate revenue requirement for a particular service should be derived from the costs assigned to the interstate jurisdiction for the service. If this were not the case, a mismatch in costs and revenues could result, leaving a LEC with an over-recovery or under-recovery of its investment and expenses.

67. To avoid these potential adverse consequences, we believe that the EES measurement method should be used to allocate the FGA and FGB traffic not only for cost separations purposes but also for interstate access charge billing purposes. Accordingly, we believe that the Commission should direct the LECs to require use of the EES measurement method in their interstate access tariffs.

68. Moreover, we believe that the states and the LECs should use an intrastate billing approach that avoids the problems that could potentially occur if each jurisdiction billed for the same minutes of use. Thus, to the extent that states and the LECs use a per minute of use rate structure for intrastate access charge billing purposes, they should use the EES method, or a substitute method authorized pursuant to the procedures described in paragraph 61.[58] We believe that an orderly system for billing access charges on a minute-of-use basis where the same usage is divided by both federal and state jurisdictions into interstate and intrastate minutes presumes that compatible methodologies are used by the two jurisdictions. In particular, a per minute of use billing system that al-

locates all usage between interstate and intrastate jurisdictions presumes that each access minute is either interstate or intrastate, but not both.[59] Use of EES by both federal and state jurisdictions would satisfy the need for compatible methodologies.[60]

C. *Verification Procedures*

69. In the *EES Order*, the Commission recognized the legitimate interest of the states and LECs in assuring the accuracy of IXC usage estimates, observing that "|w|here economic interests are at stake, it is not wholly satisfactory to require one party to rely entirely on the bald assertions of the other party." The Commission, however, indicated that legitimate verification procedures must not be unduly burdensome or intrusive, or discriminatory in application. Rather, such procedures must strike an appropriate balance between the needs of the LECs and states, on the one hand, and the concerns of the IXCs on the other. The Commission sketched its view of reasonable and effective verification procedures in that Order:

> a) The LEC may require, as a condition of providing FGA and FGB access without ANI, that the IXCs keep records of call detail from which the percentage of interstate and intrastate use can be ascertained, and to make those records available for inspection as reasonably necessary for purposes of verification.
>
> b) The LEC may not, however, reasonably impose on the IXC an unqualified obligation to submit to audit.
>
> c) To reduce the likelihood that the IXCs are unduly hampered in conducting their business by intrusive auditing, the LECs may require that IXCs submit to audits only "at specific intervals of substantial duration (as, for instance, annual intervals) rather than upon 'reasonable' prior request . . . ."[61]

70. The Commission specifically directed the LECs to incorporate "reasonable auditing and reporting requirements" consistent with the recommendations in the *EES Order* in their interstate access tariffs as a condition of providing FGA and FGB access. Moreover, while the Commission refrained from establishing uniform, nationwide verification procedures, it noted that the inclusion of verification provisions in the interstate access tariffs "would presumably obviate any need for the LECs to establish similar requirements in their state access tariffs, as the information that they would obtain in auditing interstate entry/exit surrogate usage would enable them to verify intrastate usage as well." Finally, the Commission cautioned that if states imposed burdensome verification requirements that interfered with federal policy, it would be forced to reconsider whether to establish more specific federal requirements.

71. The LECs, state commissions, and IXCs generally agree that there must be some procedures to verify that the IXCs accurately measure and report the jurisdictional nature of their FGA and FGB traffic to the LECs. Most contend that absent proper verification procedures, whatever measurement method is established could be meaningless. Commenters generally acknowledge that the states and the LECs have legitimate interests in assuring the accuracy of the IXC usage estimates. On the other hand, most agree that this interest must be balanced against the burden placed on the IXCs by the verification procedures and the potential for abuse by the LECs. The parties disagree, however, about what kinds of verification procedures strike the appropriate balance among the various interests and who should establish and implement them.

72. The LECs and state commissions generally urge that the states, not the federal jurisdiction, should be responsible for developing and overseeing verification procedures. The IXCs, on the other hand, generally argue that national verification procedures are necessary in order to prevent state commissions and LECs from establishing inconsistent and/or overly burdensome verification procedures to which they will be subjected.[62] Some states and LECs strike a middle ground, recognizing a legitimate role for the Commission in establishing minimum reporting and data retention requirements, but urging that the states be permitted to impose additional requirements to further their own regulatory goals so long as those requirements do not unreasonably interfere with the Commission's authority.

73. We conclude that reasonable verification procedures are necessary to assure that the EES measurement method yields accurate and reliable results.[63] We also recognize that states should have reasonable flexibility to accomplish this verification for intrastate usage. We are concerned, however, that verification procedures not be unduly burdensome or intrusive.

74. The Commission, in its *EES Order*, declined to establish uniform nationwide verification procedures but listed some interim guidelines to address these types of concerns. We are also reluctant to recommend nationwide procedures at this time. The record in this proceeding and our experience with implementation of the *EES Order* do not indicate that specific, uniform, nationwide verification procedures are presently necessary to prevent the states and LECs from imposing unreasonably burdensome or inconsistent verification procedures on the IXCs. While state commissions and LECs have in fact established various verification requirements, including audits, the record before us does not demonstrate that these requirements are so burdensome or intrusive on the IXCs as to warrant the imposition of mandatory nationwide procedures.[64] Thus, we are not recommending the establishment of uniform, nationwide verification procedures. Instead, we recommend certain guidelines for the LECs to file in their interstate tariffs.

75. Although we do not propose to restrict the states to the same verification procedures as those filed in the interstate tariffs, we believe that the information gathered for purposes of identifying interstate usage may suffice for intrastate verification as well, and thus states may not need independent verification requirements. In any event, we strongly encourage states to consider carefully these verification guidelines to avoid overburdening carriers with two sets of verification procedures and to avoid jurisdictional conflicts.

76. Generally, we recommend permanent establishment of the guidelines set forth in the *EES Order*, with certain adjustments. As noted, those guidelines permit LECs to require IXCs to keep relevant call detail records from which a PIU can be derived and to make those records available for inspection and audit "at specific intervals of substantial duration (as, for instance, annual intervals. . . ."[65] We note that some of the provisions contained in the interstate LEC access tariffs on file with the Commission are inconsistent with the *EES Order*. We recommend,

therefore, that the Commission require the LECs to amend their verification provisions to comport with the permanent guidelines established in this order. We further recommend that the Commission modify the *EES Order* guidelines to limit verification audits of IXCs to no more than one per year, except in extreme circumstances. For example, an additional audit may be required if an IXC reports an intrastate allocation in one update period that represents a substantial change over its most recent reported figures, and that is not due to seasonal changes or other identifiable reasons. Although we generally see no need for more frequent audits, in that case an additional audit would appear reasonable due to the deviation from historical usage patterns. Moreover, we recommend that audits be conducted by independent auditors if the LEC and the IXC or the IXC alone is willing to pay the expense.[66] The use of such auditors would significantly reduce concerns about the proprietary nature of the data being audited without sacrificing reliability.

VI. ORDERING CLAUSE

77. ACCORDINGLY, the Joint Board RECOMMENDS that the Commission adopt the proposals discussed above concerning the allocation of FGA and FGB traffic between the interstate and intrastate jurisdictions for access charge billing and cost separations purposes. [67]

FOR THE FEDERAL-STATE JOINT BOARD

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments:
American Telephone and Telegraph Company
Ameritech Companies
Bell Atlantic Telephone Companies
BellSouth Corporation
Blue Valley Telephone Co.
GTE Sprint Communications Corporation
Illinois Commerce Commission
Iowa Telephone Association
MCI Telecommunications Corporation
Missouri Public Service Commission
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company
New York State Department of Public Service
NYNEX Telephone Companies
Oklahoma Corporation Commission
Organization for the Protection and Advancement of Small Telephone Companies
Pacific Bell
Pennsylvania Public Utility Commission
Southern Bell Telephone & Telegraph Company
Southern New England Telephone Company
Southwestern Bell Telephone Company
US Telecom, Inc.
United Telephone Systems, Inc.
Public Utilities Commission of the State of California
Virginia State Corporation Commission
Public Service Commission of Wyoming

Parties Filing Reply Comments:
BellSouth Corporation
GTE Sprint Communications Corporation
Iowa Telephone Association
MCI Telecommunications Corporation
Missouri Public Service Commission
Organization for the Protection & Advancement of Small Telephone Companies
Pacific Bell
Southern Bell Telephone & Telegraph Company
Southwestern Bell Telephone Company
United States Telephone Association
United Telephone System, Inc.

APPENDIX B

Parties Filing Supplemental Comments:
American Telephone & Telegraph Company
Bell Atlantic Telephone Companies
BellSouth Corporation
GTE Service Corporation
McLoud Telephone Company
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company
National Telephone Cooperative Association
NYNEX Telephone Companies
Pacific Bell Companies
Southwestern Bell Telephone Company
United States Telephone Association
United Telecommunications, Inc.

Parties Filing Supplemental Reply Comments:
MCI Telecommunications Corporation
Southern New England Telephone Company
Southwestern Bell Telephone Company
United States Telephone Association

FOOTNOTES

[1] In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, CC Docket No. 85-124, Notice of Proposed Rule Making and Order Establishing a Joint Board, FCC 85-196 (released Apr. 25, 1985).

[2] MCI Telecommunications Corporation, Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Services, FCC 85-145 (released Apr. 16, 1985) (*EES Order*), *recon. denied*, FCC 85-595 (released Nov. 13, 1985). *See infra* at para. 6.

[3] Order Inviting Comments, CC Docket No. 85-124, FCC 85-570 (released Oct. 28, 1985) (inviting comments on the revenue/billing aspects of the measurement problem); Supplemental Notice of Proposed Rule Making, CC Docket No. 85-124, FCC 86-460 (released Dec. 9, 1986) (inviting comments on the related jurisdictional cost separations issues).

[4] Under the EES method of jurisdictional determination, calls which enter an IXC network in the same state as that in which the called station is located are deemed to be intrastate, and calls which terminate in a different state than their IXC point of entry are considered interstate.

[5] *See* discussion *infra* at para. 61.

[6] *See* discussion *infra* at para. 74.

[7] ANI capability enables the carrier to identify the originating number of a call which when combined with the called number reveals the jurisdictional nature of the call. ANI capability is available with AT&T's Feature Group C access as well as with "equal access" FGD.

[8] *See infra* note 47. In addition to the absence of ANI capability, with FGA and FGB the called number information is transmitted to the IXC but is not captured by the LEC.

[9] Call detail, used by the IXCs to bill their own customers, consists of call-by-call information, including the call's terminating address (*i.e.*, called number), the call duration, the trunk groups or access lines over which the call is routed, and the point at which the call enters the IXC's network. In the absence of ANI, however, call detail does not permit an IXC to identify the originating address -- or calling number -- of a call.

[10] *See supra* note 2.

[11] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082 (1984) (*ECA Tariff Order*).

[12] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-188 (released Apr. 27, 1984) (*April 27 Tariff Order*).

[13] *Id.* *See* sections 2.3.14 and 2.3.15 of NECA's interstate switched access tariff, effective May 25, 1984.

[14] *Id.* at 2-9. *See also supra* note 12. To prevent double recovery of state and federal access charges if intrastate lines were part of a multi-line hunt group or service group, the Commission directed LECs to determine intrastate usage by multiplying the percent of the customer's total lines that were ordered as intrastate by the total usage on all lines. For example, if a customer ordered 7 interstate and 3 intrastate lines, 30% of the total usage on the lines would be billed at intrastate rates.

[15] In the *ECA Order*, the Commission rejected the relevant NECA tariff provisions and ordered the LECs to develop new provisions that were "reasonable and not unduly intrusive." *Id.* at Appendix C, 2.3.14 (B). In the *April 27 Tariff Order*, the Commission rejected the revised filings. The Commission expressed concern that these filings created the potential for "double recovery" of state and federal access charges and "vague" and "burdensome" LEC verification of IXC reports. *Id.* at Appendix B, 2-8, 2-9.

[16] "False" intrastate traffic describes the situation in which a call appears to be intrastate in nature but is, in fact, an interstate call. "False" interstate traffic describes a similar situation involving apparently interstate -- but in fact intrastate -- traffic.

Under the EES method of jurisdictional measurement, there are two principal types of false intrastate traffic. The first type is associated with toll-free calling areas that overlap state boundaries. In such situations, an interstate call originating in State A and terminating in State B may actually enter the IXC network and terminate in the same state -- State B -- and thus be "falsely" identified as an intrastate call. The second type of "false" intrastate traffic involves routing an interstate call through a "leaky" PBX to an IXC. In such a situation, a call originating in one state is placed over a private line that connects to a PBX in another state. The caller can access an IXC by way of the PBX that terminates the private line. If such a call is completed within the same state in which the PBX is located, the call would appear to be intrastate, but is really interstate.

[17] MCI indicated that in developing its jurisdictional usage estimates for report to the LECs under the NECA tariff provisions, it had reduced its intrastate access usage as determined by the EES by 15%.

[18] *See* MTS and WATS Market Structure, Phase I, CC Docket No. 78-72, Third Reconsideration Order, FCC 85-149, adopted March 28, 1985.

[19] *EES Order* at paras. 25, 31-32. The Commission did not preempt the states in this area, and thus did not require that states use the EES method; it did, however, strongly urge the states to do so on an interim basis until a permanent, comprehensive solution to the jurisdictional measurement problem could be found. In addition, the Commission acknowledged the imprecision of the EES method in certain situations, and noted that "individual states may want to incorporate into this entry/exit formula adjustment factors in recognition of false inter- and intrastate traffic if such factors are more reflective of actual conditions." *Id.* at para. 25. The Commission cited some of the proposals, such as the "SMSA" and "billing address" adjustments being considered by the states, *see infra* at para. 31, and indicated that this Joint Board, which it was convening to consider these issues, would examine such alternative methods of usage measurement. *Id.* at paras. 29-30.

[20] *Id.* at para. 28. The Commission suggested that the LECs incorporate in their 1986 annual interstate access tariffs reasonable verification procedures consistent with these views. The Commission also expressed its belief that "the incorporation of such provisions [in the interstate tariffs] would presumably obviate any need for the LECs to establish similar requirements in their state access tariffs, as the information that they would obtain in auditing interstate entry/exit surrogate usage would enable them to verify intrastate usage as well." *Id.* at para. 32.

[21] *Id.* at para. 29.

[22] *Id.* at para. 33.

[23] Subsequent to the Commission's *EES Order*, several aspects of the jurisdictional measurement and verification provisions included in the LEC switched access tariffs filed on July 2, 1985, were challenged in petitions seeking rejection or suspension of those tariffs. In an order designating for investigation certain of the terms and conditions contained in those July 2 filings, the Common Carrier Bureau (Bureau) declined to address the challenged measurement and verification tariff provisions pending conclusion of this Joint Board proceeding. *See* In the Matter of Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, Order Designating Issues for Investigation, CC 4963 (released June 9, 1986). The Bureau noted that some of the same issues raised in the context of the access filing proceeding were before this Joint Board. *Id.* at para. 5.

[24] Parties filing Comments and Reply Comments are listed in Appendix A.

[25] For example, BellSouth suggests that the interstate/intrastate split for an IXC's FGD traffic in a particular state, which is measurable, could be used as a possible surrogate for the IXC's FGA and FGB traffic in the same state.

[26] Ameritech notes that in some cases the LEC may be disadvantaged by application of an unadjusted EES; thus, the rule should also permit LECs to request IXCs to perform such studies under certain conditions. Otherwise, Ameritech reasons, the IXCs would initiate such studies only where it is in their own economic interest to do so, thus distorting the overall jurisdictional results of the adjusted EES. Ameritech observes that because intrastate access rates are generally set at higher levels than interstate rates, IXCs have the incentive to overstate interstate minutes.

[27] The Missouri PSC currently requires use of these adjustments to the EES. The major metropolitan areas of Kansas City and St. Louis cross the Kansas and Illinois borders, respectively. *See* discussion *infra* at para. 31.

[28] On Nov. 27, 1985, GTE Sprint Communications Corp. and US Telecom, Inc. filed comments in this proceeding. On July 1, 1986, GTE Sprint merged with US Telecom, Inc. to form US Sprint. In this order, we treat each set of comments separately, and, as indicated in the text, we refer to GTE Sprint as "Sprint."

[29] *See supra* note 27. Sprint includes in its comments a list of metropolitan areas which have significant cross-border traffic.

[30] For a discussion of the operation of the billing address adjustment, *see infra* note 35.

[31] Sprint explains its proposal by providing an example of FGB tandem access connections in a cross-border situation. In Missouri, the St. Louis local calling area crosses a state boundary into Illinois. A Sprint customer in East St. Louis, Ill. would place an interstate call to Jefferson City, Mo. by gaining access to the Sprint network in St. Louis, Mo. If Sprint's network in St. Louis is connected to the local network by FGA interconnection, it would not be possible to determine with any degree of reliability where that call originated. If a FGB access tandem is used to interconnect with the local network, however, the jurisdictional nature of a call can in most circumstances be accurately determined since the area of coverage of the tandem switch is generally known and definable and usually does not cross state boundaries. In order to provide originating capability comparable to the coverage provided by FGA access, Sprint would have to interconnect to two FGB tandems: one on the Missouri side and one on the Illinois side of the border. Since only a single state is covered by each tandem, the state in which the call originated could be determined by noting on which trunk group the call originated (*e.g.*, the trunk group from the tandem on the Missouri side or the tandem on the Illinois side). Sprint recognizes that in certain instances, however, the FGB tandem group might itself cross a state border; in such cases, it would not be possible to utilize the above method to determine the jurisdiction of the call. *See* Comments of Sprint at 5-7.

[32] *See supra* note 28.

[33] Wyoming observes that this incentive results from the fact that intrastate access charges in some states may be higher than the charges for interstate access.

[34] Illinois notes that this would in effect force states to accept federally derived determinations of appropriate FGA and FGB charges, and acknowledges that such a procedure is not appropriate as a national policy, but should be left to the states.

[35] With respect to the SMSA adjustment, Missouri explains that in the case of the Kansas City Metropolitan area, 66% of the SMSA population lives in Missouri and 33% lives in Kansas, and accordingly it recently designated as Missouri intrastate traffic 66% of the traffic that entered MCI's network through its Missouri POP -- serving both Kansas City, Kansas and Kansas City, Missouri -- and terminated in the state of Missouri.

This adjustment is not IXC specific, but rather assumes that the customers of any given IXC reside in the relevant states in the same proportion as the general population split between those two states. Missouri says it adopted this surrogate as an interim measure, despite this flaw, because it could be immediately implemented. Missouri is developing the "billing address" method and will require its use on a permanent basis because it believes it is a more accurate adjustment to the EES than the SMSA method. By using this method for FGA and FGB traffic, only calls that originate and terminate in Missouri (based on the EES) *and* are billed to a Missouri address will be treated as intrastate calls.

[36] U S West cites, for example, a state requirement that IXCs keep records in order to justify their intrastate rates.

[37] As an example, MCI cites certain tariffs that allow for an audit upon demand, or extremely short notice, or more frequently than one per year, or that require the IXC to provide all of its call detail data. *See* MCI Comments at 9-10. Many of these tariff provisions remain in effect today.

[38] MCI suggests that this arrangement will avoid the expense and disruption of multiple audits in multiple states, as well as ensure the privacy of IXC proprietary information, since the auditor will be selected by the IXC rather than the LEC. This auditor will also have the advantage of being familar with the IXC's operations and records. MCI claims it has already voluntarily submitted to such an audit by an independent accounting firm and that several LECs have indicated their acceptance of this procedure.

[39] Sprint also incorporated into these comments its Petition to Reject in Part or Alternatively to Suspend and Investigate in Part switched access tariffs filed by the Bell Operating Companies on July 2, 1985, in which it challenged various verification and reporting requirements contained in those tariffs. *See supra* note 23. In that petition, Sprint noted that these tariffs generally provide for exchange carrier measurement of minutes and the jurisdictional reporting of use on FGD facilities where measurement equipment is available. In view of the fact that IXCs have a legitimate interest in the verification of these LEC measurements, Sprint urged that any verification procedures applicable to IXC jurisdictional reports should apply equally to LEC measurement of minutes and jurisdictional measurement of usage on FGD facilities.

[40] In order to eliminate incentives for IXCs to misreport the jurisdiction of their traffic, Illinois also urges the individual states to establish, whenever possible, parity between the interstate and intrastate access charges for FGA and FGB services.

[41] *See* Section 36.125, 47 C.F.R. § 36.125 (1987), 52 Fed. Reg. 1733-1734 (May 6, 1987).

[42] *EES Order* at para. 4 and n. 7.

[43] Supplemental Comments were filed on January 14, 1987, and Supplemental Reply Comments on February 13, 1987. Parties filing Supplemental Comments and Supplemental Reply Comments are listed in Appendix B.

[44] As noted above, in the *EES Order*, the Commission required, as an interim solution to the measurement problem, that the percentage of interstate usage of FGA and FGB should be estimated according to the EES method.

[45] Certain commenters, while conceding that there is strong support for use of the unadjusted EES, urge this Joint Board to refrain from recommending that the EES or any other method

be adopted nationally and/or on a permanent basis for either access recovery or for cost separations purposes. *See* Comments and Reply Comments of USTA and NTCA.

[46] *See, e.g., Hawaiian Telephone Co. v. Public Utility Commission*, 827 F.2d 1264, 1274-1276 (9th Cir. 1987); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566, 567 (7th Cir. 1984); *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1146-1147 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *New England Tel. & Tel. Co. v. Public Utilities Comm'n*, 448 A.2d 272, 298 (Me. 1982).

[47] While actual measurement is obviously the best way of ensuring accurate jurisdictional determination of interstate and intrastate traffic, it does not appear that the ANI capability is available for FGA under any circumstances, and is only available for FGB access connections in some circumstances. Thus, it does not appear that actual measurement is possible for FGA, or likely for FGB traffic.

[48] *EES Order* at para. 20. No commenter in this proceeding disputes this Commission finding.

[49] We note that the Common Carrier Bureau records reflect no complaints (formal or informal) from IXCs, states, or LECs on this issue during the past several years.

[50] As discussed above, the NTCA and OPASTCO proposal for a long-term resolution of the jurisdictional classification of all access traffic involves the elimination of FGA and FGB access connections after a transition period and the development of technical features to measure all access traffic as well as a nationwide data base. Most commenters oppose this proposal, which essentially requires overhaul of the entire access charge plan, as beyond the scope of this proceeding, and as potentially wasteful in light of the scope of the jurisdictional misclassification problem.

[51] The record indicates that false traffic under the EES method is most common in major metropolitan areas that cross state boundaries and in toll-free calling areas that cross state lines. *See* Comments of the Missouri PSC at 3-8; Comments of Sprint at 2-5. To address this situation, Missouri and Kansas have adopted the SMSA population adjustment as an interim measure and are developing and have prescribed use of a billed address method as a permanent adjustment to the EES. We note that Sprint has also suggested an alternative measurement method involving FGB tandem access connections which appears to be more accurate in certain situations that the EES. To the extent that this method meets the specified conditions for adjustments (including state and Commission approval), it may be used as a substitute measurement method.

[52] Of course, a state commission may also propose an adjustment to the EES method for jurisdictional cost separations that it believes will yield more accurate results, and should clarify whether the proposed method applies to all LECs in the state or only to some. Any state commission proposing such an adjustment for separations purposes would similarly be required to obtain Commission approval. *See also infra* note 55.

[53] If the proposed alternative involves service provided jointly with another LEC, the LEC proposing the modification must provide assurances that the other LECs involved in providing the joint service will make parallel changes in their tariffs.

[54] Section 36.125 provides for apportionment of access lines on the basis of "relative dial equipment minutes of use." 47 C.F.R. § 36.125 (1987).

[55] In the unlikely event that the Commission should disapprove a filing seeking approval of a substitute method which the state commission believes is otherwise consistent with these requirements, the Commission should refer the matter to a Joint Board.

[56] 47 C.F.R. § 36.125.

[57] *Supplemental NPRM* at para. 10.

[58] The record indicates that the states follow federal practice for making such allocations. Since we are recommending that the Commission implement a billing mechanism that will assure that there will be no interstate charges on "intrastate minutes", we believe it appropriate to encourage procedures to assure that no state charges will be assessed on interstate minutes under the EES formula. The recommendation that the states should use compatible measurement methodologies would not apply to the situations where individual states have chosen to adopt rate structures that differ from the existing interstate per minute of use rate structure. We of course do not encourage the states to adopt differing rate structures, but we recognize that some may choose to do so.

[59] A further benefit that flows from the use of a uniform measurement methodology for identifying minutes of use for costs and billing purposes by both federal and state jurisdictions is that the double billing of access minutes that could result if different methodologies were used would likely affect some IXCs quite differently from others depending on the network configurations and access services they use. Such "selective" double billing effects, which might result if the federal and state jurisdictions employed different measurement techniques for allocating FGA and FGB access minutes between the jurisdictions for access charge billing purposes, could have obvious discriminatory and anticompetitive effects.

[60] EES is the clearest compatible methodology; we recognize that billing approaches other than the usage based EES method could also avoid these problems.

[61] *EES Order* at para. 28 and n. 22.

[62] Thus, MCI supports Commission adoption of uniform verification procedures, and advocates establishing a nationwide annual audit requirement for each IXC to be conducted by an independent certified accounting firm.

[63] We decline to accept suggestions by US Telecom that the Commission and not the LECs should verify these IXC reports. The Commission retains authority to review the verification procedures contained in LEC interstate tariffs and to act upon complaints filed pursuant to the Communications Act concerning implementation of these procedures or the proper assessment of actual charges. However, we do not deem it appropriate or necessary to preclude the service providers -- the LECs -- from obtaining verification of usage reports from their IXC customers under reasonable terms and conditions.

[64] While MCI noted in its initial comments the existence of provisions in certain interstate access tariffs which allow for an audit upon demand, or upon short notice (*see supra* note 37), it has filed no formal or informal complaints with the Commission challenging these provisions. To the extent MCI believes these provisions impose too great a burden on it, it may seek redress from the Commission through the complaint process.

[65] We do not intend this to be an open-ended recordkeeping requirement. We would expect that the IXCs' call detail records would reflect only the period since the last annual inspection. If inspections are less frequent than annually, reasonable recordkeeping adjustments may have to be made.

[66] Sprint notes that it would be most efficient and cost effective if the independent auditor for PIU verification purposes was the same one who prepares the IXC's annual financial audits, since that auditor would be familiar with the IXC's accounting and billing procedures. While we see no reason to oppose the use of such auditors, we would expect that the IXC would pay the audit expenses in that case.

[67] This recommendation is adopted pursuant to Sections 4(i), 4(j), 201, 202, 203, 205, 403, and 410 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i)-(j), 201, 202, 203, 205, 221, 403, and 410 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 86-422

In the Matter of

Amendment of the rules
regarding control and
security alarm devices
under Part 15

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1989; Released: February 27, 1989

By the Commission:

INTRODUCTION

1. By this Memorandum Opinion and Order, the Commission denies a joint petition for reconsideration, filed on May 12, 1988, by the National Academy of Science, through its Committee on Radio Frequencies (CORF), and the National Radio Astronomy Observatory (NRAO). The parties are concerned with radio astronomy operations. CORF/NRAO has requested the Commission to reconsider in part its decision in the *Report and Order*[1] *(Order)* in this proceeding with respect to the establishment of field strength limits for radiated emissions in the restricted bands[2] above 1000 MHz from control and security alarm devices.

BACKGROUND

2. In a *Report and Order* in Docket No. 20990[3], the Commission established the current Part 15 regulations for control and security alarm devices. In the *Report and Order* the Commission established, among other things, an emission limit in the restricted bands below 1000 MHz for control and security alarm devices. However, no numerical limit was established for emissions in the restricted bands above 1000 MHz. Subsequently, by a *Memorandum Opinion and Order*, a limit of 125 uV/m at 3 meters was established for emissions in the restricted bands above 1000 MHz. In response to this decision, four petitions were filed[4] stating that manufacturers could not meet the adopted limits above 1000 MHz, and requesting the Commission to stay the adopted rules for garage door opener controls, grant waivers for security alarm devices, and initiate a rule making proceeding to address a higher limit for emissions in the restricted bands. In order to allow the Commission and the manufacturers of such devices additional time to consider the matter of limits for emissions in the restricted bands above 1000 MHz, the Commission granted a stay[5] and waiver[6] of the rules so that measurement of emissions above 1000 MHz was not required.

3. In response to the petitions, the Commission issued a *Notice of Proposed Rule Making* (*Notice)* in the above-entitled proceeding.[7] As a result of the proceeding, an *Order*[8] was adopted which changed the emission limit in the restricted frequency bands above 1000 MHz from 125 uV/m at 3 meters to 500 uV/m at 3 meters; changed the measurement method for determining the average level of emissions from a pulsed system; and adopted a time frame within which all devices must comply with the regulations.

SUMMARY OF PETITION AND COMMENTS

4. In their petition, CORF/NRAO requested that the Commission partially reconsider its decision in the *Order* and maintain and enforce a limit of 125 uV/m at 3 meters for emissions appearing in four radio astronomy bands below 5 GHz.[9] The petitioners state that the separation distances they previously calculated and submitted in response to the *Notice* are correct, and indicate that they have submitted more detailed calculations with their Petition. In addition, they believe that the Commission erred in believing that the CCIR Report[10] filed in response to the *Notice* was based on the premise that interfering signals fell within the main beam of a radio astronomy antenna, and in believing that CORF/NRAO failed to take terrain shielding into account. They indicate that the rule change effected in the *Order* in this proceeding will have a harmful impact on radio astronomy, and that the emission limit of 500 uV/m at 3 meters should not have been adopted.

5. Oppositions to CORF/NRAO petition were filed by Interactive Technologies, Inc. (ITI), Pittway Corporation (Pittway), Linear Corporation (Linear), The Door Operator and Remote Controls Manufacturers Association (DORCMA), The Chamberlain Group (Chamberlain) and Rollins, Inc. (Rollins). They believe that there should be no stay in the effectiveness of the *Order* in this proceeding, and that the Commission should re-affirm its findings.

6. Pittway supports the Commission's decision. However, since the devices it manufactures operate on frequencies that are not harmonically related to the radio astronomy bands in question, Pittway indicates that it does not object to the change in limits requested by CORF/NRAO. Chamberlain and DORCMA support the Commission's decision, and continue to believe that the only way they could economically meet the 125 uV/m at 3m limit would be to avoid frequencies having harmonics in the radio astronomy bands.

7. Rollins opposes reconsideration on the basis that the petitioners have supplied an incomplete set of facts which do not support their request. They believe that the submission by CORF/NRAO lacks credibility inasmuch as CORF/NRAO have never been able to document their claim of interference. In addition, Rollins believes that all parties, FCC, NTIA, IRAC, DORCMA, *et al.*, were in agreement that the standards adopted in Docket 86-422 were in the best interest of all concerned.

8. ITI indicates that the petitioners have failed to demonstrate that any harmful interference will result from relaxation of the emission limit, and therefore have shown no basis for reconsideration. They go on to state that the emission patterns from security devices are not similar to those for which the radio astronomers are looking, and the limited emissions which may be received can be "averaged out."

9. Linear points out that the petitioners have failed to provide enough data concerning a radio astronomy antenna, to determine whether the received levels asserted to be harmful interference can be received by the antenna. They indicate that the petitioners have failed to quantify and explain the relationship between the theoretical isotropic antenna, used in the referenced CCIR Report, and a real world radio astronomy antenna. Linear goes on to state that CORF/NRAO indicates that calculations have been supplied, but in fact have only provided tables of information without explaining the mathematical assumptions, formulas, or algorithms used to calculate the assertions made in the petition. Linear questions the assumption presented in the petitions that garage door openers and security emitters are uniformly distributed throughout the United States. It was from this assumption that the petitioners derived the number of control and security devices and their emission levels within an interference distance of radio astronomy operations.

10. CORF filed two replies to the comments in opposition to the petition. In the replies, CORF again asserted the validity of the CCIR Report 224-5. In addition, they disagree with the contention that unwanted emissions can be "averaged out" of the data obtained by the radio astronomy operations, since certain characteristics of the wanted signals are such that they cannot be distinguished from man-made interference.

DISCUSSION AND DECISION

11. CORF/NRAO contends in the petition that the Commission should base the limits applied to the restricted bands on the data contained in CCIR Report 224-5.[11] The petitioners base their need for tighter emission limits on the sensitivity of the equipment employed in radio astronomy operations. Although CORF/NRAO have not been able to document any interference to their operations from Part 15 devices, they maintain that such documentation would require the use of tracking equipment having the same sensitivity as that of equipment used at radio astronomy receiving sites. In CCIR Report 224-5, referenced by CORF/NRAO, it is stated that, "(t)he long integration time required to bring the wanted signal out of the noise will mask the characteristic features of the interfering signal. It cannot be recognized as interference and erroneous data will result; this type of low-level interference is particularly harmful. Furthermore, because the radio astronomer cannot determine by examination of the data that he has encountered interference, there is no possibility of identifying the source." Therefore, according to CCIR Report 224-5, it is not possible, based upon examination of the data obtained, for a radio astronomer to determine if interference resulted from emissions from a Part 15 device or from a transmitter operating in the authorized radio services.

12. The Commission has observed that within the frequency bands of concern to the petitioners, and for which more stringent emission limits are sought, harmonic emissions can be expected from a number of sources, including Part 15 devices. Among these sources are transmitters operating in the FM and TV broadcast services under Part 73, the land mobile services under Part 90, the aviation services under Part 87, and U.S. Government operations. In addition, the second harmonic of emissions from the space-to-earth link of radiodetermination satellite operations falls within the 4990-5000 MHz radio astronomy band. Thus, the authorized radio services also provide numerous potential sources of unwanted emissions which could fall within the radio astronomy bands and possibly affect their operations. It is important to note that unwanted emissions from equipment used in the authorized radio services are permitted to be more than 1000 times greater than unwanted emissions from Part 15 devices. Since unwanted emissions from equipment used in the authorized services are permitted to fall within the radio astronomy bands, and at a much higher level than those permitted to be radiated from Part 15 devices, the Commission must recognize the probability that the unidentified interference referenced by CORF/NRAO may be caused by emissions from equipment used in the authorized radio services. The Commission cannot accept speculation that significant interference has been caused by Part 15 devices.

13. In the *Order*, the Commission pointed out that the objective in establishing emission limits in the restricted frequency bands is to minimize the potential for interference to the sensitive radio services authorized to operate in those bands. It was with this objective in mind that the Commission established the 500 uV/m at 3 meters limit as a balance between the desire for interference control and the economic difficulty of producing devices to comply with the limit. It should be noted that before the adoption of this limit in Docket 86-422, the requirement to measure emissions above 1000 MHz had been removed by a partial stay for garage door opener controls[12] and a waiver for security alarm devices.[13] As a result, these devices, in effect, had no limit on the emissions that could appear in the restricted bands above 1000 MHz. As a result of this action, we are now providing limits where, in effect, no limits existed previously. We believe that our action will provide suitable protection to radio astronomy activities.

14. In the *Order*, the Commission found that there was insufficient evidence to support the CORF/NRAO contention that emissions at a level of 500 uV/m at 3 meters, from Part 15 devices, would cause interference to radio astronomy operations. The Commission continues to find that CORF/NRAO have not presented any information in their petition for reconsideration that had not been considered previously by the Commission in reaching the decision in this proceeding. For this reason, and in light of the above discussion, the Commission is not persuaded by the arguments set forth in CORF/NRAO's request for reconsideration of the decisions in the *Report and Order* in General Docket 86-422.

15. Accordingly, **IT IS ORDERED THAT** the joint petition for reconsideration filed by the National Academy of Science, through its Committee on Radio Frequencies, and the National Radio Astronomy Observatory, **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Report and Order*, Gen. Docket 86-422, 3 FCC Rcd 1702 (1988).

[2] These restricted bands are used for radionavigation, radio astronomy, safety services and U.S. Government operations which are particularly susceptible to extraneous radio frequency signals. In accordance with Section 15.205(a) of the regulations, no emissions are permitted within these specific bands. Until the action in this Docket, this provision was considered to be met as long as emissions within the restricted bands above 1000 MHz did not exceed 125 uV/m at 3 meters.

[3] *See Report and Order* in Docket No. 20990, adopted October 22, 1981, 50 RR 2d 667 (1981), and *Memorandum Opinion and Order* in Docket No. 20990, adopted October 28, 1982, 52 RR 2d 775 (1982). This proceeding established the current Part 15 regulations for control and security alarm devices.

[4] The Commission initiated this proceeding in response to four petitions. These included: 1) a petition for rule making, RM-4637, filed in October 5, 1983, by the Door Operator and Remote Controls Manufacturers Association (DORCMA); 2) a petition for rule making, RM-4813, filed on June 12, 1984, by the Security Equipment Industry Associating (SEIA); 3) requests for waiver and stay file on October 12, 1984, by Transcience Industries; and 4) a petition for partial stay filed on November 21, 1984, by SEIA.

[5] *See Order* Granting Partial Stay, FCC 84-12, adopted January 12, 1984. This *Order* allowed garage door opener controls to demonstrate compliance with the regulations and test procedures in effect prior to the adoption of Docket No. 20990. The provisions of this *Order* did not apply to control devices other than garage door opener controls.

[6] *See Order* Granting Waiver in Part, FCC 84-18, adopted January 16, 1984. This *Order* allowed the manufacturers of security alarm devices which were under development at the time of this *Order* to obtain a waiver of the requirement to report emission measurements above 1000 MHz. Unless otherwise specifically granted, this *Order* did not apply to security alarm devices on which development began after January 16, 1984.

[7] *See Notice of Proposed Rule Making*, Docket No. 86-422, 1 FCC Rcd 1111 (1986).

[8] *Supra* at Note 1.

[9] The frequency bands below 5 GHz that were referenced by CORF/NRAO are 1400-1427 MHz, 1660-1668.5 MHz, 2690-2700 MHz and 4990-5000 MHz.

[10] *See* Report 224-5, "Interference Protection Criteria for the Radioastronomy Service", International Telecommunication Union, International Radio Consultative Committee, Recommendations and Reports of the CCIR, 1982, Volume II, XVth Plenary Assembly.

[11] *Id.*

[12] *Supra* at Note 5.

[13] *Supra* at Note 6.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Joseph A. Marino
Chairman, Review Board

MM Docket No. 87-236

In re Applications of

KEY BROADCASTING CORPORATION — File No. BPH-850709MK

FENWICK ISLAND BROADCAST CORPORATION & LEONARD P. BERGER d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I — File No. BPH-850712ZD

FENWICK ISLAND COMMUNICATIONS, INC. — File No. BPH-850712ZE

GLORIA J. FERNANDEZ-PEREYO MERRYMAN — File No. BPH-850712ZI

For a Construction Permit For
A New FM Broadcast Station
Fenwick Island, Delaware

ORDER

Adopted: February 14, 1989; Released: February 27, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it for consideration the unopposed motion filed by Key Broadcasting Corporation to dismiss its application in this proceeding with prejudice. In support of its motion, Key states that it does not desire to participate in the anticipated filing of exceptions to the Initial Decision (I.D.) herein (FCC 88D-36, released November 14, 1988) and that it has decided not to continue to prosecute its application, which was denied by the I.D. Key attaches to its pleading a declaration under penalty of perjury that neither it nor any of its principals has received or been promised any consideration for dismissal of its application. Also, in accordance with Section 73.3525 (d) of the Commission's Rules, 47 C.F.R. 73.3525 (d), each applicant remaining in hearing has submitted declarations of no consideration which were filed on February 6, 8, and 9, 1989. In view of the foregoing, Key's motion will be granted.

2. ACCORDINGLY, IT IS ORDERED, That the motion to dismiss filed December 2, 1988 by Key Broadcasting Corporation IS GRANTED and Key's application (File No. BPH-850709MK) IS DISMISSED.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

DLBS INCORPORATED File No. BPCT-840920KJ

MONTGOMERY COUNTY MEDIA NETWORK, INC. *et al.* d/b/a IMAGISTS File No. BPCT-841129KF

CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY File No. BPCT-841129KK

CONROE BROADCASTING, LIMITED PARTNERSHIP File No. BPCT-841129KV

WOOD BROADCASTING COMPANY File No. BPCT-841129KW

G-A COMMUNICATIONS, INC. File No. BPCT-841129LE

For Construction Permit
Conroe, Texas

ORDER

Adopted: February 14, 1989; Released: February 27, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Initial Decision of Administrative Law Judge Luton, 3 FCC Rcd 6710, denied the applications of DLBS Incorporated and Conroe Broadcasting Limited Partnership. Neither applicant has filed exceptions.

2. ACCORDINGLY, pursuant to Section 1.276(f), 47 CFR 1.276(f), the applications of DLBS Incorporated (BPCT-840920KJ) and Conroe Broadcasting Limited Partnership (BPCT-841129KV) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-580

In re Applications of

COMMUNITY BROADCASTING CO., INC. File No. BPH-860916MD

JOHN F. WHITE File No. BPH-860918OB

For a Construction Permit for
a New FM Station on Channel 250A
in Wiggins, Mississippi

Appearances

Samuel Miller, on behalf of Community Broadcasting Co., Inc.; *David D. Oxenford*, *Lisa R. Mikalonis*, and *John K. Hane*, on behalf of John F. White; and *Arthur I. Steinberg*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: February 10, 1989; Released: February 27, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Community Broadcasting Co., Inc. (Community) and John F. White (White) for a new class A FM station in Wiggins, Mississippi. The applications were designated for hearing by the Chief, Audio Services, Division, by *Hearing Designation Order*, DA-1944, released January 20, 1988.[1] The designation order specified the following issues for hearing:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: White.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. The designation order permitted the adduction of comparative coverage evidence under the standard comparative issue. The parties have, however, stipulated that the differences in the areas and population to be served are insignificant and that neither applicant would claim a comparative advantage on the basis of its proposed coverage (Jt. Ex. 1).

3. By a separate order the air hazard issue against White was resolved in his favor. *See*, *Order* FCC 88M-2144, released July 8, 1988.

4. A prehearing conference was held on March 29, 1988. A hearing session was held on August 1, 1988 and the record was closed on that date. Tr. at 119; *Order*, FCC 88M-2523, released August 3, 1988. Proposed findings of fact and conclusions of law were filed by Community and White, respectively, on September 23 and 27, 1988; replies were filed on October 11, 1988.

FINDINGS OF FACT

Community Broadcasting Co., Inc. (Community)

5. Community is authorized to issue 100,000 shares of common voting stock, par value1.00. Its officers, directors, and stockholders are as follows:

Name and Address	Office	No. of Shares
Alton R. Byrd Wiggins, MS	President Director	18,880 (51%)
Gayon J. Byrd Wiggins, MS	Secretary/Treasurer Director	18,120 (49%)
Grover C. Dunn Hixson, TN	Vice President Director	0

The Byrds are husband and wife. Dunn is the brother of Gayon J. Byrd (Community Ex. 1). There have been no discussions with any other parties about investing in Community (Tr. 61, 85).

6. Community has been the licensee of daytime AM station WIGG, Wiggins, Mississippi, since November 1, 1979. WIGG operates on 1420 kHz with a power of 5 kW, non-directional and has authority to operate at night with a power of 78 watts. Community has promised to divest its ownership of WIGG within three years of the grant of program test authority for its Wiggins FM station, pursuant to the Commission's Daytimer Preference Policy (Community Ex. 1).

7. Mr. and Mrs. Byrd are joint owners of 5,610 shares (52.73%) of the stock of The Stone-Lamar Broadcast Services Corporation, license of FM station WLUN, Lumberton, Mississippi. In addition, Mr. Byrd individually owns 850 share of stock (8%) in this company. The Byrds have timely filed a commitment to divest all their interests in WLUN prior to the commencement of program test operation by Community's Wiggins FM station (Community Ex. 1). There are no restrictions to the Byrds' ability to sell their interests in WLUN (Tr. 84-85). The other stockholders in WLUN are aware of this divestiture commitment (Tr. 85).

8. In 1985, Mr. Byrd was a 50% principal in South Mississippi Broadcasting Company, Inc. (South Mississippi), an applicant for construction permit for a new television station at Wiggins, to be operated on Channel 43 (Tr. 70-71). The television application contained a divestiture commitment by him to divest his interest in WLUN and WIGG upon grant thereof (Tr. 72). That application was dismissed as a result of a settlement agreement with a competing applicant (Tr. 72). Subsequently, South Mississippi filed a petition for the allocation of another TV channel (56) to Wiggins (Tr. 74). In comments on the Commission's Notice of Proposed Rule Making, filed on

December 8, 1986, South Mississippi supported that proposed allocation. It stated that it would file an application for the station when the allocation was final, and if granted, would promptly construct it (Tr. 75-76). Since then, the channel has been allocated to Wiggins, but applications for it cannot be filed because of the existing freeze imposed by the Commission (Tr. 74-75). Mr. Byrd was not sure at this time if he would file for Channel 56 (Tr. 75-79). However, if he decided to apply, he would make the same promise to divest himself of WIGG and WLUN, contingent on the grant of the hypothetical application for Channel 56 (Tr. 80).

9. Other than set forth above, Community or its principals have no ownership or other controlling interest in any other broadcast station, any CATV system, print publication, or any other medium of mass communications (Community Ex. 1).

10. In the event of a grant of Community's application, *Alton R. Byrd* will serve as general manager of the FM station as well as WIGG, devoting at least 40 hours per week to such activities, until WIGG is divested, at which time he will devote 40 hours per week to the FM station as General Manager. This will not involve any greater demands on his time at present since, at the time of the inception of program test authority, the Byrds will no longer be associated with WLUN. His duties at both the proposed FM station and at WIGG will be a continuation of the activities described in paragraph 12, *infra*.

11. Alton R. Byrd has been a resident of Wiggins since November 1978. He was one of the incorporators of Community in July 1978 and has been a director from that time on. He has served as its president and majority stockholder since 1979 (Community Ex. 2).

12. Mr. Byrd has had broadcast experience over the past 25 years. In 1977 he became assistant manager of WIGG(AM), Wiggins, Mississippi, when it was licensed to Joedron Broadcasting. On November 1, 1979, the license for WIGG was assigned to Community, and Mr. Byrd has served as its general manager since then. He has been general manager of Station WLUN since it commenced operation in December 1983. As general manager of both stations, which operate from the same studio, Mr. Byrd has devoted at least 40 hours per week to his duties. He is in charge of the day-to-day operation of these stations, including but not limited to, setting all station policies, hiring and firing personnel, assuring compliance with all federal and local laws and regulations, and sales (Community Ex. 2; Tr. 86).

13. Mr. Byrd has been a member of the Wiggins Rotary Club since September 30, 1978. For the past 4 years he has been a member of the Stone County Economic Development Foundation.[2] He is a member of the New Covenant Assembly of God Church in Wiggins and has held various positions there for the periods indicated: a) Sunday School Superintendent 1984-1987; b) Finance Committee 1984-1985; c) Pastor's Advisory Board 1984-1987.

14. During the Christmas season for the past 4 years, Mr. Byrd has played Santa Claus for the city of Wiggins. Since 1978, Mr. Byrd has been a principal organizer, on an unpaid basis (Tr. 83), of the annual Magnolia State Bluegrass Festival held in Wiggins. This is a 4-day event during the summer. It features entertainers primarily of bluegrass music, and concession stands. Mr. Byrd has also been an organizer, on an unpaid basis (Tr. 83), of the Pine Hill Celebration held on the Saturday of the Bluegrass Festival. The event features arts and crafts, 5 kilometer run, live entertainment, food booths, civic club booths, and sales by local merchants (Community Ex. 2). Stations WIGG and WLUN simulcast the remote broadcasts of these events. The Byrds receive no compensation for stations' promotional announcements on behalf of the festivals. Stations are paid for spot announcements broadcast on behalf of merchants promoting the events (Tr. 87).

15. *Gayon J. Byrd* will devote at least 40 hours per week to her positions as Business Manager and News Director of Community's FM station, continuing to maintain her position at WIGG until it is divested. After that divestiture, she will continue her work at the FM station. As Business Manager, she will supervise and set policies for the business aspects of the FM station. She will be in charge of all accounting aspects of the station, including accounts payable and receivable, responsibility for preparation of tax returns and other financial reports, and verification of the airing of commercial continuity. As News Director, Mrs. Byrd will be in charge of all news gathering activities of the station, including setting policy and determination of what events to cover and the manner of coverage (Community Ex. 3).

16. Mrs. Byrd has been a resident of Wiggins since November 1978, when she moved there with her husband, A. R. Byrd. She has been an officer, director and 49% shareholder of Community since November 1979 when it became the licensee of WIGG. She has been an officer, director, and together with her husband, controlling stockholders of Stone-Lamar Broadcast Services Corporation, licensee of FM station WLUN, Lumberton, ever since WLUN commenced operation in December 1983 (Community Ex. 3).

17. Mrs. Byrd began working at station WIGG in 1977 doing the billing, typing logs, writing copy etc. Since 1979, she has worked full-time and has devoted at least 40 hours per week to the day-to-day operations of WIGG, adding WLUN to her responsibilities when WLUN began operation in 1983. She does not have an official title (Tr. 41). Her duties at the stations, among others, have included keeping the books of the companies, preparation of invoices and affidavits of performance in connection with cooperative advertising, being responsible for gathering[3] and scheduling news and public service announcements, acting as manager of the station while Mr. Byrd was outside of the studio on company business, operating the board, and discussing and contributing to decisions on matters of station policy with Mr. Byrd (Tr. 41-52, 54-58). She is responsible for the maintenance of the public file, including the preparation of the quarterly reports concerning community problems and programs broadcast to satisfy such needs as ascertained (Community Ex. 3).

18. The staff at WIGG totals 5 persons, which includes Mr. and Mrs. Byrd, their 17-year old daughter, and two others (Tr. 43, 45). Mrs. Byrd is the only one of the staff involved in news at WIGG (Tr. 45, 50).

19. Mrs. Byrd's outside activities are primarily related to her volunteer work with the New Covenant Assembly of God Church in Wiggins, of which she and Mr. Byrd are members. For the past three years she has served as church pianist; this occupies approximately two hours per week of her time. For five years ending in March 1988, she devoted approximately two hours per week to teaching in Sunday School at the Church (Community Ex. 3). She also assists Mr. Byrd in his work organizing the Bluegrass Festival and the Pine Hill Celebration (Tr. 62).

20. Community will install auxiliary power generation equipment so as to enable the station to remain on the air in the event of a commercial power outage (Community Ex. 1).

John F. White (White)

21. John F. White, an individual applicant, proposes to work full time, a minimum of 40 hours per week, on a day-to-day basis as General Manager, in the event his application is granted. In that capacity he would be responsible for supervising all station employees and the overall aspects of every part of the station (Tr. 114-115; White Ex. 1). If any activity conflicts with his full-time integration commitment, he will discontinue it (Tr. 112).

22. Mr. White maintains three residences, one of which is located on Route 2, Poplarville, Mississippi, approximately 10 miles from Wiggins (Tr. 98). It is within the proposed 1 mV/m contour (White Ex. 1). He has owned this property since 1963 (Tr. 63). However, it did not become his legal and voting residence until August 1986, only one month before he filed his application on September 16, 1986. Prior to August 1986, his legal residence was New Orleans, Louisiana. He first obtained a Mississippi driver's license in June 1988 (Tr. 94). His present schedule puts him in Poplarville from Thursday through Monday each week; he spends Tuesday and Wednesday in New Orleans, where he maintains both an office and residence (Tr. 94, 105, 106). During the past year, he spent two months at his residence in Oxford, New Hampshire, a farm residence which he has maintained since 1978 (Tr. 94, 97). Mr. White has bank accounts in New Orleans, Bay St. Louis, and Poplarville, Mississippi[4] (Tr. 95). He has never worked in radio or broadcasting (Tr. 114) and has no cognizable media interests (White Ex. 1).

23. Mr. White has not been employed since 1983; he owns no businesses other than managing his investments and does not draw a salary from any company (Tr. 96, 118). If his application is granted, he will close down his New Orleans office, and would probably terminate the office soon anyway (Tr. 117). Mr. White supervises farm work at his New Hampshire residence (Tr. 113). If his application is granted, he will reduce or eliminate trips to the farm if they would interfere with his integration commitment (Tr. 113). He plans to sell the New Hampshire farm, and has had it listed with a broker since June of 1988 (Tr. 113, 118).

24. Mr. White has been involved in conservation projects within the service area of the proposed FM station. He established a wildlife preserve on his own property, providing a breeding ground for Canadian geese. He established this preserve at his own cost, on his own time. It is open to the public. For his participation in conservation projects, he was awarded the "Wildlife Conservationist Award" in 1987 by the Pearl River County Soil and Water Conservation District (White Ex. 1 at 1-2, Tr. 108).

25. Mr. White also participated in the creation of the National Wild Turkey Foundation (Tr 109). In the early 1980's Mr. White was instrumental in creating the Southern Mississippi chapter of the National Wild Turkey Foundation (White Ex. 1 at 2). The chapter serves a ten county area, including Stone and Pearl River counties. He solicited members for the organization, which helps protect and propagate wild turkeys in their natural habitat (White Ex. 1 at 2). The Southern Mississippi chapter has its headquarters in Wiggins (Tr. 109).

26. In 1984 or 1985, Mr. White provided the use of a bulldozer and one of his employees to assist in the restoration of the athletic playing fields at the Magnolia Community City, which is located about 4 miles southeast of his home (White Ex. 1 at 2).

27. Mr. White proposes to maintain an auxiliary power generator sufficient to continue station operations in the event of a local power failure (White Ex. 2 at 1; Tr. 110-111).

CONCLUSIONS

Diversification

28. Neither applicant suffers a diversification demerit. White has no media interests and Community's principals have timely pledged to divest their interest in Station WLUN and WIGG(AM).

Best Practicable Service

29. Community is entitled to 100% quantitative integration credit. Both will work full-time at the proposed station. Further, Mr. Byrd's position as General Manager and Mrs. Byrd's position as Business Manager and News Director constitute recognized management positions. The fact that Mrs. Byrd will also perform non-managerial functions does not preclude the award of full-time integration credit. *See Debra D. Carrigan*, 100 FCC 2d 721, 726 (Rev. Bd. 1985, *review denied*, 104 FCC 1d 826 (1986). In this connection, it must be remembered that Wiggins is a small community, not a metropolis. Also, Community proposes a "Mom and Pop" operation; its staff consists of the Byrds, their daughter, and two other employees. Under these circumstances, the performance by the Byrds of non management functions is a matter of necessity and does not devalue their entitlement to integration credit.

30. White attacks the proposed credit sought for the integration of Mrs. Byrd on the ground that she was not familiar with the details of the preparation and prosecution of the application. However, unlike *Pacific Television, Ltd.*, 3 FCC Rcd. 1700 (1988) and the other cases cited, Mrs. Byrd has a long track record in the performance of her duties at WIGG and WLUN, and as a principal of Community. Clearly, she is a *bona fide* principal of Community.

31. White also contends that Mr. Byrd's alleged inconsistent integration proposals in other filings raises a question of the permanence of his integration commitment. This contention is devoid of record support. First, the fact that Mr. Byrd has been general manager of station WIGG since he acquired the license in 1979 demonstrates the frivolous nature of this contention. Moreover, the fact that Mr. Byrd reduced his ownership interest in station WLUN following the grant in 1983 does not support White. White overlooks the fact that Mr. Byrd, as promised in the WLUN application, has worked at WLUN since its inception. Further, Mr. Byrd's pledge to divest WIGG and WLUN to comply with Section 75.3555 of the Rules, made in a 1985 application for a new UHF television station in Wiggins is of no consequence in light of Mr. Byrd's dismissal of that application. White also challenges the integrity of Mr. Byrd's integration proposal because of Mr. Byrd's intention to file for a new television channel in Wiggins in the future. First, the Commission has imposed a freeze which bars the filing of such

application. In addition, assuming the freeze is lifted and Byrd decides at that time to file an application, there is no guaranty Mr. Byrd's application would prevail. Moreover, the filing and grant of the hypothetical television application would not necessarily preclude the fulfillment of Mr. Byrd's integration proposal since under note 4 of Section 73.3555 of the Rules, the television application could be granted without divestiture of the FM station. White's challenge to Community's integration credit is, therefore, without merit and is rejected.

32. Community receives substantial enhancement for the principals' residence in Wiggins since 1978. Community also receives slight to moderate credit for Mr. Byrd's civic participation and slight credit for Mrs. Byrd's very limited civic activity. Community also receives credit for Mrs. Byrd's female status.

33. The Commission has determined that daytime-only licensees, such as Community, who apply for FM allotments in their community of license, are entitled to special consideration. In such cases, the value of broadcast experience as an integration enhancement is upgraded "so that it will be equal to the enhancement value of local residence minority ownership" *In the Matter of Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, (Second Report and Order)*, 101 FCC 2d 638, 645 (1985). To be entitled to the daytimer preference, the applicant must meet the five prerequisites established by the Commission. The Commission requires that (1) the applicant must have had substantial participation in the management of the daytime-only station;[5] (2) the daytime-only licensee must apply for an FM station in the same community of license as its AM station; (3) the applicant must propose to be integrated in the operation of the FM station; (4) the applicant must own the daytime-only station for three continuous years prior to designation of the hearing for the FM channel; and (5) the applicant must pledge to divest the daytime-only facility within three years from commencement of program test authority on the FM station. *Second Report and Order, supra*, at 645-647; *Memorandum Opinion and Order, supra*, at 1222.

34. With respect to the first requirement, the Byrds work full-time at WIGG(AM). The record further reflects that both participate in the management of the station. Mr. Byrd serves as general manager. Although Mrs. Byrd does not have an official title, she serves in various management roles including those that a news director and business manager would perform at a small station with a limited staff. Further, she also participates with Mr. Byrd on decisions involving matters of station policy and acts as general manager in Mr. Byrd's absence. It is recognized that the Byrds' full-time involvement also encompasses their management of station WLUN. It is impossible to calculate with mathematical certainty the amount of time the Byrds devote to each of the stations on a given day. However, given the fact that WLUN's and WIGG's studios are co-located and the stations operate with basically the same staff[6] it is reasonable to conclude that the Byrd's management of WLUN does not materially impair their ability to devote considerable time to the management of WIGG-AM. Moreover, eligibility for a daytime preference merely requires the Byrds to spend more than 20 hours per week (either individually or in the aggregate) participating in the management of WIGG-AM. The record amply establishes that the Byrds have satisfied that requirement.

35. The record establishes that the remaining requirements have also been satisfied. The FM station applied for is in the same community as their AM station. Community's principals propose to be integrated in the operation of the FM station. Further, their integration proposals are credible and are accepted. In addition, Community has operated its AM station for the required time and has pledged to divest that facility within the prescribed period. Therefore, Community receives an upgraded broadcast experience enhancement equal to local residence or minority ownership.

36. White is also entitled to 100% integration credit based on his proposal to serve full-time as the stations general manager. No evidence has been offered undercutting White's entitlement to such integration credit. In this connection, the fact that Mr. White's current employment consists of overseeing his investments and that he has no broadcast experience does not raise doubts about his willingness or ability to implement his integration proposal.

37. Mr. White has never been a resident of Wiggins and does not propose to move there. One of Mr. White's three residences is within the proposed service area. Although he has held this property since 1963, it did not become his legal and voting residence until August 1986, one month before he filed his application. On the basis of these facts, White receives slight local residence enhancement. In addition, Mr. White receives slight civic participation enhancement for his participation in conservation projects and his assistance in restoring an athletic playing field.

Auxiliary Power

38. Since both applicants propose auxiliary power, neither is entitled to a preference on this factor.

Comparative Summary

39. The applicants are equal under the diversification criterion. Also, both receive a quantitative integration score of 10.000. However, Community's qualitative enhancement is significantly superior to that of White. In this connection, Community's local residence and civic participation enhancement are superior. Also, unlike White, Community receives female credit and upgraded past broadcast experience enhancement equivalent to local residence or minority ownership under the Commission's daytimer-preference policy.[7] For these reasons, Community's application is granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[8] the application of Community Broadcasting Co., Inc. for a construction permit for a New FM Station on Channel 250A in Wiggins, Mississippi IS GRANTED, and the application of John F. White for a construction permit IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The application of Colon Johnson (Johnson), which was also designated for hearing was dismissed by the Presiding Officer on motion of the applicant. *See Order*, FCC 88M-1530, released May 23, 1988.

[2] Wiggins is located in Stone County.

[3] A separate employee gathers the local news for WLUN (Tr. 44-45).

[4] Bay St. Louis is approximately 40 miles from Wiggins (Tr. 96).

[5] "Substantial participation" requires a showing "that members of the entity holding cognizable ownership interests spent more than 20 hours per week (either individually or in the aggregate) participating in the management of the daytime-only facility during the three-year period". *FM Channel Assignments (Increased Availability), (Memorandum Opinion and Order)* 59 RR 2d 1221, 1229 (1986).

[6] As noted, *supra*, a separate employee gathers the local news for WLUN (Tr. 44-45). In all other respects, the staffs are the same.

[7] Assuming Community was not entitled to the daytimer preference it would still receive credit for the Byrds' substantial broadcast experience.

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-139

In the Matter of

Reorganization and Deregulation
of Part 97 of the Rules
Governing the Amateur Radio
Services.

ORDER

Adopted: February 10, 1989; Released: February 15, 1989

By the Chief, Private Radio Bureau:

1. On April 13, 1988, the Commission released a *Notice of Proposed Rule Making* (*Notice*) in this proceeding, 3 FCC Rcd 2076 (1988), proposing to reorganize Part 97 of the Code of Federal Regulations, 47 C.F.R. Part 97. Part 97 governs the Amateur Radio Services.[1] Comments were due on or before August 31, 1988. Reply comments were due on or before October 31, 1988. On August 22, 1988, the Chief, Private Radio Bureau, extended the comment period to and including November 29, 1988, and the reply comment period to and including January 31, 1989, 3 FCC Rcd 5277 (1988).

2. On January 26, 1989, David B. Popkin filed reply comments and a request for an extension of time until July 17, 1989, to reply to the comments filed in this proceeding by The American Radio Relay League, Inc. (ARRL). In the alternative, the petitioner requests that the Commission issue a Second Notice of Proposed Rule Making so that comments could be filed to ARRL's comments.

3. The petitioner argues that more time is needed to evaluate the comments submitted by the ARRL because they consist of a complete rewrite of the Commission's proposal. He asserts that the additional time is needed to ensure that all of the necessary topics have been covered and that there are no inconsistencies between the various sections.

4. The comment period in this proceeding was open for more than six months. Subsequent to that period, there was a two month period in which interested parties had an opportunity to file reply comments. In all, more than ten months have passed since the proposal was adopted. In the interest of administrative efficiency, it is desirable that the proceeding be moved forward. To grant the petitioner's request would only serve to delay the proceeding for approximately six more months.

5. Further, it is noted that the request for an extension of time is procedurally defective. Pursuant to Section 1.46(b) of the Commission's Rules, 47 C.F.R. § 1.46(b), such requests must be filed at least seven days before the due date for receiving reply comments. In this proceeding, reply comments were due on or before January 31, 1989. The petitioner's request, filed January 26, 1989, was not timely filed.

6. In view of the foregoing, IT IS ORDERED, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, that the request of David B. Popkin to extend the time for filing reply comments until July 17, 1989, IS DENIED. The reasons given for denying the time extension apply equally to the request for the issuance of a Second Notice of Proposed Rule Making. IT IS THEREFORE FURTHER ORDERED that the request for a Second Notice of Proposed Rule Making IS ALSO DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTE

[1] These services consist of the amateur service, the amateur-satellite service and the radio amateur civil emergency service (RACES).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC. *et al.* — File No. BPH-850712GV *et al.*

For Construction Permit for a New FM Station in Bay Shore, New York, Channel 276A

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1989; Released: February 27, 1989

By the Commission:

1. The Commission has under consideration a Review Board Memorandum Opinion and Order, *Warren Price Communications, Inc.*, 2 FCC Rcd 7409 (1987); an "Appeal" filed January 19, 1988 by Long Island Music Broadcasting Corporation (LIMBC); and an Opposition filed February 3, 1988 by Fire Island Broadcasting. Although LIMBC's pleading is titled as an "Appeal," it will be considered as an application for review. LIMBC asks the Commission to reinstate its application that was dismissed because of procedural deficiencies. *Warren Price Communications, Inc.*, FCC 87M-2552 (ALJ Oct. 13, 1987).

2. The ALJ in this proceeding issued an Order Prior to Hearing. *Warren Price Communications, Inc.*, FCC 87M-1711 (Jul. 20, 1987). The order set a date for a pre-hearing conference and detailed the matters to be discussed including: all of the substantive issues, all pending motions, discovery, documents to be produced, settlement negotiations and procedural dates. The ALJ's order also set August 5, 1987 as the date for submission of an integration and diversification statement and specified that "[a]ny failure to exchange integration proposals on the designated date may result in the loss of any integration credits." LIMBC did not file an integration and diversification statement on the prescribed date. Moreover, LIMBC's counsel did not attend the pre-hearing conference. Although it was represented by substitute counsel, the substitute counsel was not prepared to discuss any of the matters raised in in the Order Prior to Hearing.

3. Several of the competing applicants filed a Motion to Dismiss LIMBC's Application, or for Alternative Relief on September 21, 1987, relying on the above and other procedural deficiencies on the part of LIMBC. After considering a Response filed by LIMBC, the ALJ dismissed LIMBC's application because it:

> (1) failed to timely file an integration and diversification statement;
>
> (2) was represented at a pre-hearing conference by substitute counsel who was not prepared to discuss the resolution of the pending issues;
>
> (3) misfiled an untimely environmental engineering amendment and filed an accompanying petition for leave to amend that failed to establish good cause, was not executed by its attorney or a principal, and had an undated certificate of service;
>
> (4) served documents on other parties that were dated earlier than the postmarks on the envelopes containing those documents;
>
> (5) on two occasions served pleadings on the ALJ which were never filed with the Commission's Secretary;
>
> (6) failed to have its principal execute discovery responses or date accompanying certificates of service;
>
> (7) failed to serve pleadings on another party to the proceeding; and
>
> (8) filed late discovery responses without requesting additional time.

Warren Price Communications, Inc., FCC 87M-2552 (ALJ Oct. 13, 1987). The Review Board affirmed. 2 FCC Rcd at 7411 ¶ 10. Although LIMBC does not deny its failures to comply with the Commission's procedural requirements and the order of the ALJ, it argues that its derelictions do not warrant a dismissal for failure to prosecute. LIMBC's appeal (application for review) will be denied. Further comment, however, is appropriate with respect to the ALJ's exercise of his discretion in dismissing LIMBC's application.

DISCUSSION

4. In this proceeding, eighteen applications were designated for hearing. The ALJ was confronted with what could easily have become an unmanageable proceeding and it was well within his discretion to require applicants to adhere to the Commission's procedural requirements as a condition for participation in the proceeding. *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). In *Hillebrand* we stated that:

> prosecution of an application means timely compliance with procedural and substantive rules, including ALJs' orders . . . and that repeated deficiencies . . . undermine . . . a good faith intent to prosecute . . . [an] application.

1 FCC Rcd at 419 ¶ 2. The Commission further said that it is now placing:

> a greater emphasis on our responsibility to provide service to the public in the most efficient, expeditious manner possible and on the fact that delaying the initiation of new service dis-serves the public interest. . . . Consistent with this determination, . . . ALJs must be given broad discretion to regulate the course of multiparty comparative hearings.

1 FCC Rcd at 419 ¶ 3 (footnote omitted).

5. Under the circumstances of this case, we agree with the Board that the dismissal of LIMBC's application should be sustained. 2 FCC Rcd at 7410-7411 ¶¶ 6-8. As the D.C. Circuit Court of Appeals recently stated: "We think it clear that a direction to file is a command to file on time." *Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551, 1556 (1988). In *Communi-Centre*, the Court upheld the authority of an ALJ to dismiss an application where the applicant had been lax in complying with Commission procedures and dilatory in its filings.

6. In a prehearing order in this proceeding, the ALJ established a date for filing integration and diversification statements and gave the parties notice that they were to be prepared to discuss the pending issues during a pre-hearing conference. *Warren Price Communications, Inc.*, FCC 87M-1711 (July 20, 1987).[1] Not only did LIMBC not meet the filing deadline, but its principal counsel did not attend the pre-hearing conference, and counsel that did attend was not prepared to discuss the issues. Based on the totality of LIMBC's conduct and its pattern of neglect and failure to adhere to the requirements of the Commission and the order of the ALJ, the Board is correct that the dismissal of LIMBC's application was not an abuse of the ALJ's discretion.[2] In a proceeding such as this, where eighteen applications were designated for hearing, we will not interfere with the ALJ's efforts to expedite the proceeding, absent a showing that he has abused his authority. Pursuant to our holding in *Hillebrand*, we will give ALJs wide latitude to regulate the course of hearing proceedings so long as they do not act in an arbitrary or capricious manner. We agree with the Board that because LIMBC has not made such a showing here, deference is due to the ALJ.

ORDER

7. ACCORDINGLY IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Appeal (application for review) filed January 19, 1988 by Long Island Music Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We encourage all ALJs to make full use of similar pre-hearing orders to fully delineate the procedural and discovery obligations of each of the parties. The use of such pre-hearing orders will enhance the efficiency of the conduct of Commission hearings while protecting the rights of applicants to a full hearing.

[2] In its decision, the Board also noted that the ALJ refused to credit LIMBC's integration proposal and found that there was "little substantive difference between the alternative sanctions" of a refusal to credit the integration proposal and the dismissal of LIMBC's application. 2 FCC Rcd at 7411 ¶ 9. In light of our conclusions herein, we do not rely on that finding by the Board in affirming the dismissal of LIMBC's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-88-002-M

Application for authority to participate in a program for the purchase or lease of capacity in the fourth satellite to be used as part of the INMARSAT Second Generation Maritime Satellite Communications System.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: February 10, 1989; Released: February 27, 1989

By the Commission:

1. On February 24, 1988, the Communications Satellite Corporation (Comsat) filed an application requesting authority to participate in INMARSAT's procurement of a fourth spacecraft (INMARSAT-2 F4) to support deployment of the INMARSAT Second Generation Maritime Satellite Communications System.[1] The application was placed on public notice March 9, 1988. Comments were filed by Aeronautical Radio, Inc. (Arinc).[2] On May 13, 1988, Comsat filed an amendment/supplement to its pending application requesting additional authority to participate in INMARSAT's procurement of a Delta-2 launch vehicle. We grant Comsat's application for the reasons set forth below.

BACKGROUND

2. Comsat states that the procurement of the fourth Second Generation INMARSAT satellite is essential at this time because of growing maritime traffic demands, the inadequacy of existing satellites to meet future growth, operational uncertainties, and the financial incentives afforded by prompt action. According to Comsat, INMARSAT's maritime business has been showing strong growth and is expected to grow at an annual rate of eight to 10 percent. Comsat predicts that even after capacity-enhancing procedures such as dual-satellite operation and full voice activation have been implemented, without replacement satellites, traffic demands will exceed satellite capacity in all ocean regions between 1989 and 1991. In anticipation of this capacity shortfall, Comsat states that INMARSAT has also developed contingency plans for the shifting of satellites between ocean regions to minimize the problem. The procurement of the INMARSAT-2 F4 at this time will ensure that a second generation satellite will be placed in each of the three ocean regions by 1991, it states.

3. The ordering date for the INMARSAT-2 F4 satellite has been delayed to this point because of the unavailability of launch services. Comsat contends that if procurement of the INMARSAT-2 F4 were delayed until 1989, and assuming one failure in the first three launches,[3] the MCS-D satellite, leased from INTELSAT by INMARSAT, would be required to remain in the Pacific Ocean Region (POR), without a spare, until late 1992. According to Comsat, this would unacceptably impair the quality and availability of service to the public because almost one out of every two attempted calls during high traffic periods would be rejected due to lack of capacity. Comsat states, in another scenario, that procurement of the INMARSAT-2 F4 could only be delayed if INTELSAT does not remove the MCS-B in the Atlantic Ocean Region (AOR) from INMARSAT service or if all of the initial three INMARSAT-2 satellites are successfully placed into orbit. Comsat indicates that INMARSAT considers the potential adverse consequences of a decision to delay procurement to substantially outweigh the cost of a decision to procure INMARSAT-2 F4 in 1988 since neither of these two conditions could be known before the procurement must be made.

4. The cost of INMARSAT's first three Second Generation satellites, including contract amendments, is US 210 million. The INMARSAT Council at its Twenty-ninth Session, in March 1988, authorized the Director General to execute a contract change notice with British Aerospace to order the INMARSAT-2 F4 at a cost of US 74.5 million in real year dollars to be paid over four years.[4] Comsat's share of the cost would be US 20.5 million. The INMARSAT expenditure schedule is US24.8 million for year one, US 32.0 million for year two, US10.0 million for year three, and US 7.7 million for year four. Comsat states that the expected satellite delivery date is April 19, 1991.

5. INMARSAT expects delivery of three INMARSAT-2 satellites (F1, F2, and F3) in 1989. Two of these were planned to be launched on the Ariane-4 and the other on the Delta-2 in 1989. However, at the Twenty-ninth Session of the INMARSAT Council, March 16-23, 1988, it was reported that the two scheduled Ariane launch dates are likely to slip until January 1991 and January 1992, and that the resumption of STS launches is not expected before August 1988 (and its manifest remains somewhat uncertain). Consequently, the INMARSAT Council authorized the Director General to execute a contract with McDonnell Douglas Corporation (McDonnell Douglas) for launch of an INMARSAT-2 satellite on a Delta-2 launch vehicle in May 1990 at a total firm fixed price of US45.5 million, plus a contingency of US0 .7 million for optional services. This amount will be spread over 10 payments with the first payment beginning May 1988 for US 4.732 million. Comsat's share of the cost would be US12.7 million.

6. In its comments, Arinc states that it supports, in principle, the provision of AMSS(R) via INMARSAT's Second Generation satellite system. Arinc believes that the offering of INMARSAT AMSS(R) services in the United States would greatly advance the public interest. Arinc notes that the Commission tentatively concluded in its notice of proposed Rule Making in CC Docket No. 87-75[5] that the public interest would be served if AMSS(R) services were provided in the United States on a competitive basis and that the AMSS(R) portion of INMARSAT's second generation system would be the best means to

promptly initiate such service. Arinc states that it and Comsat have jointly submitted a framework that would allow for the expeditious introduction of INMARSAT AMSS(R) services into the United States and would serve the objectives identified by the Commission in CC Docket No. 87-75. Arinc adds that acceptance of the Arinc/Comsat proposal would ensure that the objectives of securing the prompt establishment of INMARSAT aeronautical services in the United States would be advanced by granting the authorization requested by Comsat.

DISCUSSION

7. In reviewing Comsat's application to participate in INMARSAT programs for construction and operation of a satellite system, we consider such factors as current spacecraft status, expected traffic growth, contingency plans in the event of satellite failure, need for new services, costs and expected revenue, and other factors as they may be relevant. We also consider other elements of the public interest that are not judged solely on economic or service benefits including United States' obligations under the INMARSAT Convention, the policy embodied in Section 502 of the Maritime Satellite Act and Section 1 of the Communications Act, as amended, and general principles of international comity.

8. On January 7, 1986, we authorized Comsat to participate in the procurement of the first three satellites in the INMARSAT Second Generation satellite series for the AOR.[6] The first two INMARSAT satellites were intended to serve the AOR beginning in mid-1988, and the third was intended as a spare in case of launch failure. If the first two launches were successful, the third satellite would be used in the Indian Ocean Region (IOR). Since INMARSAT was still considering the timing of Second Generation satellites for the POR and IOR at that time, we limited our authorization to the proposals that involved the AOR.

9. INMARSAT currently leases space segment capacity in three ocean regions from the European Space Agency (ESA) on MARECS satellites, from INTELSAT on INTELSAT V satellites equipped with Maritime Communications Subsystem (MCS) packages and from Comsat General on a MARISAT satellite launched in 1976. According to Comsat, only half of INMARSAT's First Generation satellites are expected to continue to be available until the early 1990s: the INTELSAT MCS-C contract was terminated in 1987 because of performance degradation; the MARECS-A in POR continues to suffer progressive solar array failures; and INTELSAT has contingency plans to remove the MCS-B in AOR from INMARSAT service in March 1990 if INTELSAT replacement satellites are delayed. In this case, the AOR MARECS-B2 would not be available for relocation to another ocean after the first INMARSAT-2 launch. INMARSAT now expects the delivery of three Second Generation satellites (F1, F2 and F3) in 1989. With the delivery of F4 in 1991, the ability to place a Second Generation satellite in each of the three ocean regions by 1991 will be achieved, even assuming one launch failure.

10. Upon review of Comsat's application, we find INMARSAT's plans to introduce a Second Generation satellite in each of the three ocean regions by 1991 to be an operationally sound approach for meeting future maritime traffic demands and maintaining acceptable grade-of-service[7] at a reasonable cost. INMARSAT's First Generation program was based on traffic growth scenarios which projected AOR saturation by 1988 when the Second Generation program would be implemented. Because of launch unavailabilities, launches of the Second Generation satellites have been substantially delayed. Procurement of the INMARSAT-2 F4 and the Delta-2 launch vehicle at this time will allow INMARSAT effectively to meet the growth in INMARSAT service demand. Present maritime service projections, with annual growth of eight to 10 percent, indicate saturation in all ocean regions between 1989 and 1991. In addition to allowing capacity to meet demand, procurement of the INMARSAT-2 F4 and Delta-2 launch vehicle will ensure placement of a Second Generation satellite in each ocean region by 1991. We find that Comsat's application demonstrates this result and approve the introduction of an operational Second Generation satellite in each of the three ocean regions to meet rising maritime traffic levels and provide service at acceptable performance standards. We further find that the projected US 120.7 million capital investment in INMARSAT-2 F4, (US 74.5 million) and Delta-2 launch vehicle (US 46.2 million) is reasonable given the clear need for these facilities within the planned timeframe and in view of the benefits that will be realized in improving INMARSAT maritime services. The United States continues to be the largest user of the INMARSAT system and will benefit from an improved Second Generation system.

11. We therefore conclude that it is in the public interest to allow Comsat to participate in INMARSAT's plan to procure a fourth INMARSAT Second Generation spacecraft (INMARSAT-2 F4) with a delivery date of April 1991, and a Delta-2 launch vehicle with a delivery date of May 1990. Comsat is authorized to expend its share of these costs amounting to US 33.2 million (US 12.7 million for launch vehicle and US 20.5 million for the INMARSAT-2 F4 satellite).

12. Issues involving provision of aeronautical mobile satellite services via INMARSAT will be considered in CC Docket No. 87-75. We note that Arinc supports, in principle, Comsat's participation in the procurement of the Second Generation INMARSAT satellite, F4. Although INMARSAT-2 F4 has the capability to provide aeronautical service, our approval for Comsat's participation in procurement of a fourth Second Generation spacecraft should not be interpreted as authorization for Comsat or anyone else to provide aeronautical services via INMARSAT or prejudgment of the issues in CC Docket No. 87-75.[8] Neither should our approval be interpreted as authorization for Comsat or anyone else to provide land mobile satellite services via INMARSAT in the United States. INMARSAT is currently considering whether to amend the INMARSAT Convention to give the organization general competence to provide such services. While the U.S. is supporting such competence, it has made it clear that no policy determination has yet been made in the U.S. as to whether INMARSAT would be permitted to provide land mobile satellite services in the United States.[9]

13. Accordingly, IT IS ORDERED that the application of Communications Satellite Corporation, File No. CSS-88-002, IS GRANTED pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214, and Comsat is authorized pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. 753(c), to participate in INMARSAT's program to procure a fourth satellite from

British Aerospace and a Delta-2 launch vehicle from McDonnell Douglas as part of INMARSAT's Second Generation satellite communications system.

14. IT IS FURTHER ORDERED that Comsat shall not participate in any substantive modification to the construction program authorized herein without prior approval from the Commission.

15. IT IS FURTHER ORDERED that Comsat shall supplement this application as to INMARSAT's specific plans as to the timing and number of Second Generation satellites that may be introduced in the future.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The application was filed under Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. Sec. 753(c), and Title III of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 301-399(b) (1987).

[2] On April 6, 1988, Arinc filed a Motion for Extension of Time to file comments. The motion was granted on April 7, 1988 and Arinc's comments were received on April 18, 1988.

[3] The possibility of launch failures is a contingency which has been included in the planning of communications satellite systems since the advent of communications satellites. The launch failure rate during the early 1980's was very low. However, the increased launch failure rate experienced during the past few years demonstrates a continuing need to include the possibility of launch failures as a factor in the planning of communications satellite systems.

[4] If the INMARSAT-2 F4 was ordered after April 15, 1988, the price would be US 83 million, an increase of about 11 percent.

[5] *See* Provision of Aeronautical Services via the INMARSAT System, 2 FCC Rcd 1976 (1987).

[6] Memorandum Opinion, Order and Authorization, FCC 85-666, File No. CSS-85-002 (released January 7, 1986).

[7] Grade-of-service is the percentage of calls that are blocked because of all circuits being used. It is not based on the overall average of blocked calls, but rather on the average percentage of blocked calls during the busiest hour of the three busiest days of the month.

[8] To the extent that Comsat's investment in the second generation INMARSAT satellite reflects investment in aeronautical services, Comsat acts at its own risk should it decide to make payments to INMARSAT for this purpose. We will continue to require Comsat to isolate capital and expense costs associated with the aeronautical portion of its INMARSAT activities, and to separate its aeronautical accounts from other accounts used to compute rates to maritime users. *See*, Communications Satellite Corporation, File Nos. CSS-86-005-M(2), I-T-C-86-181 (released January 12, 1987).

[9] *See* Announcement of Proposed Amendment to INMARSAT's Convention and Operating Agreement, DA No. 88-546 (released April 21, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Applications of

COMSAT GENERAL CORPORATION — CSG-89-003-P/L

For Authority Pursuant to Title III of the Communications Act of 1934, as amended, to Operate a Communications and Telemetry, Tracking and Command Earth Station at Southbury, Connecticut

COMMUNICATIONS SATELLITE CORPORATION — I-T-C-89-021

For Authority Under Section 504(c) of the International Maritime Satellite Telecommunications Act and Section 214 of the Communications Act of 1934, as amended, to Provide Maritime Service in the Atlantic Ocean Region via the INMARSAT System Using a MARISAT Satellite and a MARISAT TT&C Facility Adapted for Communications Service.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: February 16, 1989; Released: February 27, 1989

By the Chief, International Facilities Division:

1. On October 20, 1988, Comsat General Corporation (Comsat General) filed the above-captioned application requesting authority to operate an 11-meter antenna at Southbury Connecticut, as a tracking, telemetry and command (TT&C) earth station and additionally requests the Commission to authorize this antenna for communications purposes.[1] Comsat General filed an amendment to its application on October 28, 1988 to reflect the lowering of its proposed power density.[2] Communications Satellite Corporation (Comsat) filed an application on November 1, 1988, requesting authority to provide maritime audio program service to ships in the Atlantic Ocean Region (AOR) via the INMARSAT System, using the L-Band capacity of the MARISAT AOR satellite currently leased by INMARSAT via the Comsat General Corporation MARISAT TT&C antenna at Southbury, Connecticut. [3] The applications were placed on public notice on October 26 and November 9, 1988, respectively. No comments were received. We grant the applications for the reasons set forth below.

BACKGROUND

2. On December 2, 1981, Comsat General filed an application for authority to construct and operate a 27 foot (8.23-meter) diameter TT&C antenna at Southbury, Connecticut. File No. 1237-DSE-ML-82. However, this application was amended on September 11, 1982 to increase the antenna diameter to 11 meters. The proposed Southbury earth station was then constructed pursuant to a waiver of Section 319(d) of the Communications Act[4] and has been providing TT&C service for maintaining, positioning and controlling the operation of the MARISAT AOR satellite pursuant to Special Temporary Authority through the present date.[5] However, Comsat General notes that the December 2, 1981 application for permanent authority has never been granted. In the present application, Comsat General resubmits and updates the information contained in its 1981 application in which it sought authority to construct and operate the 11-meter antenna at the Southbury earth station as a TT&C station and furnishes additional information related to its additional use for communications purposes.

3. Comsat General additionally seeks permanent authority to use the 11-meter antenna at the Southbury earth station for communications purposes, based on a request from Comsat World Systems Division for use of this antenna for a communications service to be provided to the Armed Forces Radio and Television Service (AFRTS).[6] According to the applicants, Comsat World Systems Division was chosen through a request for proposal (RFP) released by the Defense Communications Agency to provide transmission of a audio program channel(s) for the transmission of AFRTS Worldwide Radio Service via the INMARSAT space segment utilizing the MARISAT AOR satellite to ships at sea in the AOR.

4. The applicants state that based on a decision of the INMARSAT Council, this service initially will be provided over the L-Band capacity of the MARISAT AOR satellite which INMARSAT is leasing from Comsat General.[7] The applicants state that programs will be transmitted through the MARISAT satellite presently located at 15 degrees West Longitude. The use of the MARISAT satellite will necessitate that Comsat provide uplink facilities through the Comsat General antenna used for TT&C services for the MARISAT AOR satellite from its coast earth station at Southbury, Connecticut on a contract basis. This 11-meter earth station facility will be modified to include communications capacity needed by AFRTS, Comsat states.

5. Comsat states that the service provided to AFRTS will involve up to two simultaneous audio program channels using the voice group broadcast capability of the INMARSAT system to the ship locations receiving the broadcast. To provide this service, Comsat General will receive a Audio Program channel from AFRTS via RCA SATCOM F2R domestic satellite using a separate receive-only earth station at its Southbury earth station. Comsat General will then transmit the AFRTS signal via the 11-meter antenna at the Southbury earth station, as modified herein, for use for communications purposes, using the MARISAT/INMARSAT Systems' audio signal. The AFRTS signal transmitted from Southbury will be received by government-furnished ship earth stations in the AOR and distributed to American servicemen and their dependents.

6. To provide simultaneous TT&C communications services, Comsat General states that it will need to make relatively minor changes to its Southbury earth station antenna. These changes chiefly consist of modifications to the waveguide switching plate and the addition of related equipment, including a C-Band upconverter and a frequency synthesizer and modification of the antenna feed to enable the antenna to transmit right hand circular polarization, Comsat General explains. Comsat General has completed a frequency coordination analysis and states that operation of the Southbury earth station will comply with all applicable rules pertaining to non-ionizing radiation and will not adversely affect the environment.

7. Comsat indicates that the total cost for the AOR service, including capital equipment costs of approximately 300,826, is 593,854 over the five-year life of the contract. Comsat adds that Comsat General will provide service to Comsat on an arm's length contract basis and Comsat will perform accounting in accordance with Comsat's established accounting procedures.

DISCUSSION

8. Upon review of the applications, we find Comsat's plan to provide communications services and Comsat General's plan to modify its TT&C capabilities at its Southbury coast earth station are operationally sound approaches to meet the needs of the AFRTS network. The proposed modifications will not adversely affect the environment and the antenna will comply with all applicable rules. Comsat states its application will not extend satellite communications service into territory that, at present, is not directly served by the INMARSAT/MARISAT system and no new space segment facilities are required. Comsat and Comsat General state that the instant applications are based on a specific request for service by a branch of the United States Government.

9. We therefore conclude that it would serve the public interest to allow Comsat and Comsat General to offer this service to the Defense Communications Agency, Defense Commercial Communications Office. This service will allow transmission of AFRTS programs 24 hours per day and will replace an existing HF transmission by AFRTS over Voice of America facilities which are inadequate to serve the customer without the addition of special equipment.

10. Accordingly, IT IS ORDERED that (a) the application of Comsat General Corporation, File No. CSG-89-003-P/L, IS GRANTED pursuant to Title III of the Communications Act of 1934, as amended, to modify its 11-meter Southbury, Connecticut coast earth station to provide AFRTS communications services via the MARISAT AOR satellite at 15 degrees West Longitude in the AOR, in addition to the TT&C services; and (b) the application of Communications Satellite Corporation, File No. I-T-C-89-021 IS GRANTED pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214 and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. 753(c) to provide services, via the MARISAT AOR satellite at 15 degrees West Longitude, for the Armed Forces Radio and Television Services network in the AOR.

11. It is FURTHER ORDERED that Special Temporary Authority granted to Comsat General (File No. 1237-DSE-ML-82) on December 21, 1981 is HEREBY TERMINATED.

12. It is FURTHER ORDERED that application File No. 1237-DSE-ML-82 is DISMISSED.

13. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

14. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application was filed under Title III of the Communications Act of 1934, as amended.

[2] Comsat General explained that it had recomputed the EIRP densities in response to a request from one of the common carriers involved in the frequency coordination process and the new densitites were set forth in corrected Exhibits 1 and 3.

[3] This application was filed under Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. Sec. 753(c) and Section 214 of the Communications Act of 1934, as amended.

[4] The Section 319(d) waiver was granted on December 21, 1981.

[5] The Commission has also occasionally granted Comsat General Special Temporary Authority to use the Southbury earth station antenna for receive-only communications purposes.

[6] Comsat General has received authority to modify its Santa Paula Antenna No. 1 antenna license to enable it to be used for AFRTS service in the POR, Order, Authorization and Certificate, 3 FCC Rcd 6469 (1988).

[7] *See* Communications Satellite Corporation, 1 FCC Rcd 247 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of

DUBUQUE T. V.
LIMITED PARTNERSHIP
(Assignor)

and File No. BALCT-871204KE

SAGE BROADCASTING
CORPORATION OF
DUBUQUE, IOWA
(Assignee)

For Assignment of Television License
for KDUB-TV, Dubuque, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1989; Released: February 27, 1989

By the Commission:

1. By Memorandum Opinion and Order, the Chief, Video Services Division, Mass Media Bureau, granted the captioned application and denied a petition to deny filed by Cedar Rapids Television, Inc. (hereinafter "CRTV"), licensee of Station KCRG-TV (ABC, Channel 9), Cedar Rapids, Iowa. *Dubuque T. V. Limited Partnership*, 3 FCC Rcd 1886 (1988). On April 7, 1988, CRTV filed an application for review of that decision. CRTV's petition is opposed by Dubuque T.V. Limited Partnership (hereinafter "DTV"), licensee of Station KDUB-TV (ABC, Channel 40), Dubuque, Iowa.

2. In the proceeding below, CRTV contended that DTV had violated federal antitrust and state anticompetition laws as well as the Commission's network program nonduplication rules (47 C.F.R. Section 76.92(g)) by conspiring with the Dubuque cable television system operator, TCI Cablevision of Dubuque, Inc. (hereafter "TCI"), to black out KCRG-TV's programming on the Dubuque cable system. In its application for review, CRTV argues that the staff's decision denying its petition "erred in finding that the repeal of the must-carry rules effectively deprives stations of the protections afforded by the nonduplication rules," and that CRTV's demonstrated evidence of "clipping" by TCI was ignored. DTV has admitted to violating the antitrust laws, claims CRTV, which admission requires a full evidentiary inquiry, citing *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1985), *recon. denied*, 1 FCC Rcd 421 (1986). Moreover, CRTV maintains that recent events demonstrate a continuing conspiracy between DTV and TCI to injure CRTV in the Dubuque market, citing in support of this contention various letters among TCI, KCRG-TV and the City of Dubuque, as well as TCI's decision to relocate KCRG-TV's signal from Channel 9 to Channel 26 on TCI's system.

3. In opposition, DTV maintains that CRTV has mischaracterized DTV's statements regarding this matter, and DTV specifically denies that it has engaged in anticompetitive conduct. DTV further argues that CRTV in reality seeks relief from TCI's actions, not DTV's, yet CRTV has not complained of TCI's actions before any federal or state agency or tribunal, nor even served copies of pleadings on TCI. Citing the *Notice of Proposed Rule Making in MM Docket No. 87-314*, 2 FCC Rcd 5563 (1987), DTV maintains that CRTV's filings against DTV constitute an abuse of process, and warrant sanctions. CRTV's allegations, states DTV, are in any event devoid of merit and should be rejected.

4. In response to DTV's allegations of abuse of process, CRTV has moved for leave to supplement its application for review by filing a copy of the pleadings associated with DTV's challenge to KCRG-TV's pending license renewal. CRTV contends that it is DTV's opposition to KCRG-TV's license application that abuses the Commission's processes.

5. In challenging DTV's application, pursuant to Section 309(d) of the Communications Act of 1934, as amended, CRTV must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. §309(d)(1). *See also Astroline Communications Co. v. F. C. C.*, 857 F.2d 1556 (D.C. Cir. 1988). CRTV's allegations concerning antitrust and Commission rule violations by DTV fail to satisfy this initial pleading requirement. CRTV alleges that DTV has violated federal and state statutes governing anticompetitive practices and asserts that DTV has "admitted" these violations. Petitioner submits certain letters that it believes further document an agreement entered into and actions taken by DTV and TCI that constitute these violations.[1] Yet, CRTV does not allege that DTV has been adjudicated to have violated either federal or state antitrust or anticompetition statutes. This failure is fatal to CRTV's claim, for adjudicated status is essential to the relevance of a charge of economic misconduct under our basic qualifications criteria. The Commission has explicitly stated:

> While [broadcast related antitrust and anticompetitive] activity may have a potential bearing on the applicant's character, we do not believe it appropriate or necessary for this agency to engage in the initial investigation or enforcement of the antitrust laws. . . . [We] are of the view that, for the purposes of a character determination, consideration should be given *only to adjudications* involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility for policing such activity.

Character Qualifications in Broadcast Licensing, 102 FCC 2d at 1202 (footnotes omitted, emphasis supplied). Thus, even if we assume the truth of petitioner's contentions – that DTV has admitted the economic conduct which CRTV has described and which petitioner believes constitutes a violation of antitrust and anticompetition laws – no basis for denial of the captioned application would be presented under our existing character evaluation standards.[2]

6. Similarly, CRTV's allegations of Commission rule violations by DTV fail to meet the prima facie pleading standard of Section 309(d) described above. All of the actions CRTV complains of stem from TCI's failure to carry KCRG-TV's network programming on its cable television system in Dubuque. Yet CRTV has not alleged any basis for finding a violation of the Commission's rules in connection with the noncarriage of KCRG-TV's network programming, nor has CRTV demonstrated conduct by DTV or other parties to this assignment proceeding that would warrant further action on our part. First, during the period ending January 7, 1986, TCI was explicitly authorized by a Commission waiver to delete KCRG-TV's network programming in favor of the same network programming provided by KDUB-TV. Thus, no violation of the Commission's network program nonduplication rules could have occurred in this time frame. Second, at no time subsequent to the expiration of the waiver did KCRG-TV enjoy mandatory carriage rights on the TCI cable system in Dubuque. *See Dubuque T. V. Limited Partnership*, 3 FCC Rcd at 1887. As a significantly viewed signal under the conditions present here, KCRG-TV would at most derive a potential benefit from TCI's right under §76.92(g) of the Rules not to delete KCRG-TV's network programming at KDUB-TV's insistence. TCI, however, elected not to invoke its prerogatives under §76.92(g) and KCRG-TV could not, under then applicable rules, compel TCI to do otherwise. In sum, even accepting as true CRTV's allegations that its signal was not carried in full on TCI's system and assuming, again *arguendo*, that DTV had participated in and encouraged TCI's decision to delete KCRG-TV's network programming, no violation of the Commission's network program nonduplication rule would be established.[3]

7. Turning next to the abuse of process issues, we have an obligation not to "allow the administrative process to be obstructed or overwhelmed by captious or purely obstructive protests." *United Church of Christ v. FCC*, 359 F. 2d 994, 1005 (D.C. Cir. 1966). However, under the scheme of broadcast licensing established by the Communications Act, petitions to deny may be, and often are, filed by parties in interest, including competing broadcasters. "Even though the challenged applicant is undoubtedly put to the extra time and expense in defending his application, such burdens are an inseparable part of the statutory scheme under which the applicant seeks his authorization." *Radio Carrollton*, 69 FCC 2d 1139, 1149 (1978). Thus, in order to justify a strike petition issue, "the charging party must make a strong showing that delay is a primary and substantial purpose behind a petition to deny." *Id.* at 1151. In determining whether delay is a petitioner's primary purpose, we consider a number of factors, including: (1) statements by principals or officers of the licensee admitting an obstructive purpose; (2) the withholding of information relevant to a determination of the issues raised; (3) the absence of any reasonable basis for the allegations raised in the petition to deny; (4) economic motivation indicating a delaying purpose; and (5) other conduct of the licensee. *Id.*

8. Under these criteria and on the record before us, DTV's allegations fail to raise a substantial question of fact as to whether CRTV's pleadings in this proceeding constitute a strike petition that would raise questions concerning CRTV's qualifications in the pending license renewal proceeding for KCRG-TV.[4] DTV has not alleged that anyone connected with CRTV has admitted that its purpose in filing those pleading was primarily to obstruct Commission action on DTV's application. Nor has DTV alleged that CRTV withheld relevant information in the course of filing its pleadings with the Commission. As to economic motivation, it is clear that CRTV and DTV are competitors and that the possibility of competitive advantage as a filing motive exists. However, DTV has not provided any evidence that CRTV would stand to reap an economic benefit as a direct result of CRTV's pleadings. The only "other conduct" alleged is that the complaint brought by CRTV properly lies against the actions of TCI. While this may be a factor to be considered in judging the weight to be afforded CRTV's arguments, *see Dubuque T.V. Limited Partnership*, 3 FCC Rcd at 1887, this alone is not sufficient to establish that CRTV submitted a strike petition. Finally, we cannot say in this case that "there was an absence of any reasonable basis" for CRTV's allegations. CRTV raised colorable allegations of anticompetitive conduct by DTV which, in the proper circumstances, is an area of legitimate Commission concern. *See Character Qualifications*, 102 FCC 2d at 1190-91, 1205 n. 60 (1985).

9. We have reviewed DTV's allegations carefully because we are concerned about abuse of our processes. We cannot discourage legitimate pleadings, however, even where the merits of the arguments they raise are not persuasive, absent a strong showing that delay is the movant's *primary* and *substantial* purpose. To do so would be inconsistent with the statutory scheme, which specifically calls for participation by interested parties. The factors set out above concerning the pleading requirements for strike petition allegations impose a high burden on those seeking to raise a strike petition issue. With regard to the matters DTV has alleged, we reviewed the CRTV pleadings individually and cumulatively. Considering all the facts and circumstances of this matter, we cannot find that DTV has presented a substantial question of fact requiring a hearing with respect to abuse of process by CRTV. Nor do we find any abuse of process on DTV's part, as suggested by CRTV. CRTV has not shown, under existing standards, that DTV's primary and substantial purpose in petitioning to deny KCRG-TV's license renewal based on CRTV's filings in this proceeding was to forestall Commission action on that application. Based upon the information before us, it appears that DTV has not done anything other than aggressively to defend and assert its rights under our rules.

10. In view of the foregoing, we find that grant of CRTV's application for review would not be in the public interest, convenience, or necessity. We find no basis for rescinding the Division Chief's grant of the subject application.

11. Accordingly, IT IS ORDERED, That the "Motion for Leave to File Supplement to Application for Review" filed May 11, 1988, by Cedar Rapids Television, Inc., IS GRANTED.

12. IT IS FURTHER ORDERED, That the Application for Review filed April 7, 1988, by Cedar Rapids Television, Inc. IS DENIED and the staff action granting the subject application IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] None of these letters are from or to DTV and all of them are dated prior to the staff's decision and could, therefore, have been submitted at an earlier stage in this proceeding.

[2] Beyond CRTV's pleading failure, we note that neither the record evidence in this case nor any facts of which we may take notice suggest that any adjudication of economic misconduct by DTV has occurred. Moreover, as indicated earlier, DTV specifically denies any anticompetitive conduct on its part.

[3] CRTV raises for the first time in its application for review an allegation that its signal was "clipped" as a consequence of the deletion of its network programming on TCI's cable system. While phrased as a "clipping" offense, this allegation does not involve "clipping" as that term has ordinarily been understood in the broadcast context. As commonly used, "clipping" refers to the intentional deletion by a broadcaster of small segments of programs or advertisements and the fraudulent claim by the broadcaster that it had aired the programs or advertisements in full. "Clipping" in this traditional sense is not at issue here, and does not appear to be charged by the petitioner. Rather, the allegation in this case involves what, at worst, may be an unintentional deletion by a cable system of small portions of KCRG-TV's programming as a result of imprecise switching equipment used to select programs for carriage. To the extent, of course, that TCI's equipment may need to be examined for more accurate timing, to avoid deleting the first few minutes of those nonnetwork programs of KCRG-TV which TCI does carry, we would expect that TCI would do so. In any event, the conduct complained of by CRTV does not raise a rule violation issue against DTV.

[4] We assume, *arguendo*, that DTV's charge of procedural abuse by CRTV satisfies the prima facie pleading standard noted above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-196

In the Matter of

Amendment of Section 73.202(b), RM-5492
Table of Allottments,
FM Broadcast Stations,
(Lafayette, Louisiana)

ORDER

Adopted: February 8, 1989; Released: February 27, 1989

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission are an Application for Review of the Commission's *Memorandum Opinion and Order* (Memorandum) in this proceeding, 3 FCC Rcd 4614 (1988), filed by Oakdale Limited Partnership (Oakdale), and certain associated pleadings.

2. By letter of December 28, 1988, Oakdale requested that the Commission dismiss its Application for Review with prejudice. We find that it would serve the public interest to grant Oakdale's request.

3. Accordingly, IT IS ORDERED, That pursuant to 47 C.F.R. Section 1.115(g), the Application for Review filed August 29, 1988 by Oakdale Limited Partnership IS DISMISSED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Because there is a separate Application for Review pending in this matter, we will not terminate this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-104

In the Matter of

Amendment of Section 73.202(b),	RM-5425
Table of Allotments,	RM-5612
FM Broadcast Stations	RM-5989
(Jennings, Erath, Mamou and	RM-5990
Maurice, Louisiana; and Groves	
and Nederland, Texas)	

ORDER
(Proceeding Terminated)

Adopted: February 8, 1989; Released: February 27, 1989

By the Deputy Chief, Policy and Rules Division:

1. On August 29, 1988, Oakdale Limited Partnership (Oakdale), pursuant to Section 1.115 of the Commission's Rules, filed an Application for Review of the Commission's *Memorandum Opinion and Order* in this proceeding, 3 FCC Rcd 4611 (1988)(Memorandum). On September 15, 1988, C. R. Crisler (Crisler) filed an Application for Review of the same Memorandum.

2. By letter of December 28, 1988, Oakdale, in accordance with a settlement reached between the parties, requested that the Commission dismiss with prejudice its Application for Review. By letter of January 5, 1989, citing the same settlement, Crisler requested that the Commission dismiss his Application for Review. We find that it would serve the public interest to grant the requests of Oakdale and Crisler.[1]

3. Accordingly, IT IS ORDERED, That pursuant to 47 C.F.R. Section 1.115(g), the Application for Review filed August 29, 1988 by Oakdale Limited Partnership, and the Application for Review filed on September 15, 1988, by C. R. Crisler, ARE DISMISSED.

4. And, IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Oakdale filed an identical Application for Review in MM Docket No. 87-196, and requested in that proceeding that that Application be dismissed with prejudice as well. That request will be separately granted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-114

In the Matter of

Review of Technical and Operational
Regulations of Part 73, Subpart E,
Television Broadcast Stations

REPORT AND ORDER

Adopted: February 7, 1989; Released: February 28, 1989

By the Commission:

INTRODUCTION

1. By this *Report and Order*, the Commission is amending certain technical and operating requirements for television broadcast stations. This action continues the Commission's deregulatory review of its technical regulations as initiated by General Docket No. 83-114.[1] Thus, the intent of this proceeding is to remove those technical and operational regulations for television stations which are no longer needed and can be deleted from the rules without increasing the potential for interference. Rule amendments in the following areas, therefore, are under consideration in this phase of this proceeding:

(1) Separate operation of TV aural and visual transmitters.

(2) Power meter calibration.

(3) Color burst signal requirements.

(4) Antenna radiation pattern limitations.

(5) Equipment installation and safety specifications.

(6) Reference table for conversion of minutes and seconds to decimal parts of a degree.

BACKGROUND

2. On March 9, 1988, the Commission initiated this proceeding by adopting a *Notice of Proposed Rule Making* (*Notice*).[2] In response to the *Notice*, the Commission received comments from the Association of Independent Television Stations, Inc. (INTV), Bonneville International Corporation (Bonneville), CBS Inc. (CBS), Consumer Electronics Group of the Electronic Industries Association (EIA), Karl D. Lahm and Associates Consulting Engineers (Lahm), the Association of Maximum Service Telecasters, Inc. (MST), the National Association of Broadcasters (NAB), Public Broadcasting Service (PBS), and the Society of Broadcast Engineers, Inc. (SBE).[3] In general, the commenters supported the proposed rule amendments as presented in the *Notice*. There was nearly unanimous support for four of the six issues (1, 2, 5 and 6 above), and split support or opposition to the remaining two (3 and 4 above).

ISSUES

Separate operation of TV aural and visual transmitters.

3. Television broadcasts are usually composed of both picture and sound signals. The picture and sound generally are transmitted simultaneously via separate video and audio transmitters. Under certain conditions, however, programs may consist of picture and sound transmissions that are unrelated to one another. For example, TV stations may provide an additional broadcast service in the form of an audio program with or without visual material, or a video informational bulletin board with or without related sound information. Such a service might display the text of news, weather, and other reports. Currently, such service is restricted by our rules to "graveyard hours" (12 midnight to 6 A.M.), or for only 15 minutes just prior to a station regular sign-on time, if after 6 A.M.[4] When these provisions were adopted in 1980, the Commission was concerned that broadcasters might over use this form of service by filling their program day with audio-only or video-only bulletin board-like informational service, in place of normal programming during regular operational hours.[5]

4. In the *Notice*, the Commission expressed its belief that competitive pressures from other stations and viewer needs now constitute an appropriate basis for a licensee's deciding whether or when to provide non-associated audio or video information services. Therefore, we proposed to amend Section 73.653 by eliminating the above-mentioned limitations on the time during which separate aural and visual broadcast signals can be transmitted. None of the parties filed any opposition to the proposal. Specific comments from Bonneville, CBS, NAB, PBS, and SBE supported the proposed rule relaxation.

5. PBS asserts that the current rule intrudes unnecessarily on the discretion of broadcast licensees and serves only to stifle the implementation of new and innovative programming ideas. Bonneville agrees with the Commission's observation, presented in the *Notice*, that the informational services made possible by separate transmissions of the aural and visual signals may be of significant public benefit in some communities during regular broadcast hours. CBS suggests that the competitive video delivery marketplace will serve to ensure that television licensees do not place undue emphasis on information services, and will at the same time, allow licensees to establish a schedule for such services that will best serve their communities needs. SBE also concurs with the Commission's proposed rule amendments and further states that such deregulation of restrictions on independent programming of the audio and video channels will allow greater operational flexibility and may provide additional revenue sources. None of the comments contradicted these opinions.

6. Upon reviewing the comments, all of which supported the proposed relaxation, we can find no basis for continuing to preclude licensees from making a wider range of programming judgments. We believe that the public interest would better be served by allowing licensees to establish the duration and time of day deemed to be most appropriate for transmitting separate audio or

video services. Therefore, we are amending Section 73.653 by eliminating all time restrictions pertaining to the transmission of separate aural and video service.

Power Meter Calibration.

7. The *Notice* proposed to delete the requirement in Section 73.663(b)(3) that the transmission line meter be calibrated at intervals not to exceed six months when a television broadcast licensee uses the "direct method"" for determining a station's visual power level. The rules also provide, however, that the line meter be calibrated as often as may be necessary in order to ensure that the station is operating at the authorized level of power at all times. The *Notice* pointed out that the 6-month calibration requirement may be excessive for some stations and may be inadequate for others, depending on the quality of the particular line meter utilized. But more importantly, it noted that the 6-month calibration requirement appears unnecessary in view of the overriding requirement to calibrate the meter as often as necessary to ensure compliance with applicable tolerances. Since the current rule appears to be unnecessarily redundant, we proposed to amend it by deleting the 6-month calibration requirement.

8. Comments from Bonneville, CBS, NAB, and SBE support the proposed rule amendment. Bonneville further suggests that the elimination of the 6-month stipulation would give licensees increased flexibility to develop calibration procedures that are most effective for their stations' particular facilities. NAB asserts that the current mandatory periodic 6-month calibration of reliable equipment is costly, time consuming, and inconvenient. SBE and NAB also note that modern television transmitters are stable and reliable, and contain sophisticated monitoring and control circuits. Therefore, they are less likely to result in any out-of-tolerance operation.

9. As is evident from the brief summary given above, the comments on this issue largely reiterated the arguments presented in the *Notice*. Thus, we are persuaded that our original suppositions were valid and we are amending Section 73.663(b)(3) as proposed. We would caution that transmitter stability alone would provide an insufficient basis for this amendment, since an inaccurate metering system could result in adjustments that could result in out-of-tolerance operation. However, an accurate metering system may reasonably be expected to warn licensees of an actual out-of-tolerance condition. Thus, the accuracy and stability of the metering system appears to be more important than transmitter stability. The comments suggest that most current metering systems are highly stable. This serves as an additional, albeit secondary, impetus for amending Section 73.663(b)(3) as proposed.

Color burst signal requirement

10. We also proposed to amend Section 73.699 by eliminating Note 8 of Figure 6 (Television Synchronizing Waveform for Color Transmission), which specifies that color burst signals are to be omitted during monochrome (black and white) transmission.[7] The original basis for this requirement was that if the color burst signal was transmitted along with black and white video, color television receivers would display the effects of random noise in the form of "colored snow," which might be annoying to viewers when there were no colored scenes in the transmitted picture. This problem was particularly prominent in fringe areas, where the available signal strength was relatively weak. Thus, the deletion of the color burst signal during such monochorome transmissions allows the "color killer" circuit in television receivers to turn off the chroma generating circuits, thereby avoiding the generation of additional random noise in the received video signal. However, broadcast industry members report that a wide variety of video equipment, such as studio video recorders, frame synchronizers, time base correctors, and processing amplifiers, relies on the continuous presence of the color burst signal in order to synchronize internal circuitry. Furthermore, there is potential for disrupting the normal operation of some reception facilities, including cable television systems, recording and other equipment which depend on color burst signals transmitted by television broadcasters.

11. Additionally, some segments of the television broadcast industry contend that the current mandatory deletion of the color burst signal from monochrome signals is a costly and burdensome problem for television stations and program distributors. This is because modern video tape devices rely on the color burst signal for timing and synchronization information. For this equipment to function properly, the color burst signal must actually be added to monochrome videotapes during the editing process. Then, in order for a television station to broadcast that particular video taped programming, it must first delete the color burst signal; thereby, in many cases, requiring two additional production steps and additional equipment. To remove this burden, many broadcasters would prefer to leave the color burst signal on at all times. They contend that the above-mentioned noise effects on television viewers would be diminished today because of improvements in modern receiver design and the increased use of cable TV service in fringe areas. Comments supporting elimination of the color burst signal omission requirement were filed by INTV, Bonneville, CBS, NAB, and PBS.

12. INTV represents 176 independent stations that are not affiliated with the three major national commercial television networks. It emphasized the burden imposed by the current color burst deletion requirements on its membership, because of their greater reliance on black and white programming. It noted that many independent stations broadcast popular "re-runs" of old black and white television programs and movies. INTV also submitted a brief description of the color burst's application to the recording of black and white programming on video tape.[8] In addition to the utility of the color burst in the recording of black and white programming, INTV suggests that color burst transmissions should also remain on continuously to facilitate the insertion of colored graphics or subtitles when black and white programs are broadcast. INTV notes that during the early stages of development in both broadcast equipment and home receivers, there was a sufficient basis for the adoption of the color burst suppression requirement. During those early years, according to INTV, home color television receivers possessed less advanced circuitry, which at times displayed undesired color effects during the reception of black and white programming containing color burst signals. However, INTV now maintains that today's modern television receivers are not affected by the presence of color burst in a black and white program.

13. PBS, another broadcast user of a substantial amount of black and white video programming,[9] also asserts that advancements in television receiver technology have largely eliminated the basis for the current requirement. PBS notes that both UHF and VHF noise figures have been reduced over the past ten years, and believes that such noise figure reduction is the equivalent of increasing the level of the received signal. PBS further submits that noise figure improvements, in conjunction with the development of comb filters, and improved NTSC encoder and receiver decoder balance systems, lessen the chance that the color burst signal will cause undesired signal display effects in monochrome video signals. PBS also suggests that receivers connected to cable TV systems may avoid picture degradation because such cable systems usually distribute their signals to subscribers at an adequate level to overcome random noise. Moreover, for those viewers in fringe areas, particularly with receivers that are not of the most current technology, PBS suggests that color aberrations during monochrome programming may be eliminated by adjusting the color intensity control on the receiver to the minimum setting. Such an adjustment would be essentially the same as that many viewers now make in the intensity and/or hue control settings when changing channels, if their receivers do not have automatic color compensation circuitry.

14. Both CBS and NAB, who also support the proposal, acknowledged the burdens associated with omitting the color burst signal during monochrome programming. However, NAB argued that there is comparatively little monochrome programming being transmitted by commercial stations today; and that when it is transmitted, it is usually interspersed with color advertising or public service announcements. Thus, in contrast to INTV's and PBS's abundant use of monochrome programming, NAB states that the selective deletion of color burst, even on those relative few instances when monochrome programming is transmitted, is inconvenient, time consuming, and in some cases, technically difficult.

15. While most of the comments on this matter indicate that advancements in receiver design have largely eliminated the continued need for television stations to omit the color burst signal during the transmission of black and white video programming, some commenters disagreed. SBE, for example, challenged that assertion on the grounds that insufficient evidence had been submitted to verify such claims. SBE emphasized that the adoption of the proposal would constitute a change in the long-standing NTSC standard,[10] and could affect an interoperability standard; and therefore, should be approached with caution. SBE reports that while modern television receivers may have stable and improved color killer circuits and no longer require manual adjustment of the signal threshold level, all color receivers utilize the color killer circuit which responds to the color burst signal. Thus, if the color burst signal is received, the color killer circuit will sense the apparent existence of a color signal and will contribute to picture noise degradation. Further, in response to the proponents' claims that improved receiver noise figure is a basis for amending the color burst requirement, SBE asserts that improved noise figures of modern receivers do not negate the noise advantage provided by the color killer circuit. Rather, improved noise figures merely allow extended reception of weak television signals. Therefore, SBE maintains that the color noise reducing effect of the color killer circuit is most beneficial in the extended weak signal reception area as a result of improved noise figures.

16. The EIA, like SBE, also emphasized the fact that the presence of the color burst signal, during monochrome transmission, activates the color circuitry in all color television receivers, regardless of whether the receiver is a new or old model. Thus, EIA maintains that received picture degradation in the form of colored noise or other distortion effects, would not be minimized in fringe areas receiving weak signals with modern receivers. EIA suggests that if television broadcasters do not omit the color burst signal during monochrome programming, they should pre-filter the luminance video signal prior to encoding the transmission signal in order to minimize cross color degradation.[11]

17. In its reply comments, PBS continues to maintain that the impact of the noise resulting from the color burst signal is negligible because of improvements in receiver design and because of the increase in cable-served areas where the noise may be more noticeable. PBS raised another reason for not omitting the color burst signal, based on the visual limitations of the human eye. PBS noted that the human eye is much more sensitive to luminance (brightness) variation than it is to chrominance (color) variations. Thus, PBS believes that this eye-luminance relationship has the tangible effect of reducing the visibility of noise contributed by the chrominance signal. Therefore, when the chrominance circuits are left on during a monochrome program, PBS suggests that the noise visible on the television screen will have color components and thereby be less apparent to the human eye.

18. Finally, since the color burst omission requirement is also an interoperability transmission standard, SBE calls attention to the Commission's current policies concerning guidelines for making changes to such standards as described under Section 73.1695. SBE asserts that appropriate parts of this rule appear to require that experimentation and field tests be conducted to show that the proposed changes in transmission standards will accomplish an improvement; and that they further demonstrate the effect of the proposed change on the operation of current receivers. In the absence of such field tests results, SBE recommends that the proposed elimination of the color burst signal omission requirement during monochrome transmission should be held in abeyance until tests of the impact on existing color television receivers operating under weak signal conditions can be verified.

19. We continue to view this matter primarily as a signal quality consideration, which would have the potential to affect only the picture signal of station licensees who voluntarily elect not to omit the color burst signal during monochrome transmission. It is also important to note that licensees have incentive to weigh benefits of not killing the color burst and cost of degradation to its transmitted signal. On the other hand, we recognize the interoperability aspects of the color burst signal as it currently functions within the NTSC system. NTSC television sets are currently designed and produced in accordance with the traditional objectives of the color burst omission requirement. Because this is a long-standing basic color television operation design consideration, it may warrant, at this time, continued FCC recognition as a recommended NTSC standard.

20. In light of the contrary arguments advanced by the various commenters, we have decided to revise the color burst omission rule by making it a *recommended* mode of operation instead of an absolute operating requirement.[12] This approach should accommodate concerns about receiver design limitations and interoperability, yet allow those broadcasters, wishing to do so, to include the color burst signal during the transmission of black and white programming when they deem it appropriate. Any reduction in quality resulting from the transmissions of the color burst signal during black and white programming will be solely the responsibility of the individual broadcaster. Additionally, we will make a related editorial amendment in the rules by deleting an FCC policy reference in Section 73.4272, concerning the use of the TV color burst signal during black and white programming.[13]

Antenna radiation pattern limitation

21. Television broadcasting directional antennas may be efficacious in improving service, *e.g.*, to reduce radiation over large bodies of water and concentrate it over populated areas. In such cases, the antennas must normally comply with restrictions that limit the ratio of the maximum radiated power at any point in the antenna pattern to the minimum radiated power at some other point in the pattern (the degree of suppression or null). The Commission adopted these limits in the early 1950s. It concluded at that time that the limits were needed because of the difficulty in determining the actual radiated pattern of an antenna with very sharp nulls. In addition to being unstable, extremely suppressed antenna patterns were considered to be more likely to cause picture "ghosting" degradation in null areas because of the exaggerated signal strength ratio that is possible between the directly received signal and other reflected signals.

22. However, over the years licensees have been granted waivers to exceed the current ratio limits in order to more effectively limit the power radiated over large bodies of water, or to avoid excessive signal radiation toward the face of a hill or mountain, which could reflect the signal and cause ghosting degradation. Also, the current ratio limits have no relationship with the spacing criteria used to control interstation interference.

23. In light of our experience with television broadcasting directional antennas, the *Notice* proposed to delete the maximum-to-minimum antenna radiation ratio limitations in Section 73.685(e). This section currently specifies that directional antenna horizontal radiation patterns for stations operating on VHF channels must not have radiated signal suppressions that exceed a 10 db maximum-to-minimum ratio; and that UHF stations operating with more than 1 kW of video transmitter output power must not employ a directional antenna whose radiation pattern has suppressions that exceed 15 db.[14]

24. The comments on this issue were divided. Some comments expressed support and others indicated skepticism or opposition to the proposal. SBE fully supports the proposed rule amendments, concluding that the decision as to which antenna pattern best meets a station's requirements should be left to the station licensee, its engineering consultant and staff, and the antenna manufacturer, provided the basic requirement for coverage of the community of license is met. In this vein, the engineering consulting firm of Karl D. Lahm & Associates also expresses support for the proposal, providing the Commission maintains the present practice of requiring all television stations, directional and nondirectional alike, to fully meet the transmitter site separation requirements of Section 73.610 of the rules. However, if the use of directional antennas is intended to prevent interference in conjunction with short-spaced transmitter sites, Lahm & Associates then recommends that a restriction on the antenna radiation pattern's maximum-to-minimum ratio would be appropriate. Thus, Lahm & Associates suggests that only in cases involving short-spacing should some limitation on radiation suppression be necessary, although it need not necessarily be as restrictive as that set forth in the current rules.

25. On the other hand, CBS expresses reservations about the proposed rule amendment pending further development of the record on this issue in this proceeding and in the FM radio broadcasting Rule Making proceeding in MM Docket No. 87-121, which addresses a similar issue.[15] CBS directs the Commission's attention to comments filed in the above referenced FM broadcasting proceeding and notes that some of those comments, particularly those discussing specific details of directional antenna characteristics, may be relevant in making the appropriate determination for television broadcast stations.

26. Comments in opposition to the proposed rule amendments were based primarily on concern about the effects of signal reflection in null areas of highly directional antennas. NAB, for example, emphasized that the use of highly directionalized antennas could cause additional television "interference" to occur, particularly in the form of ghosting. NAB also references the pending FM radio broadcasting rule making mentioned in the preceding paragraph, and expresses a preference for the process of submitting waiver requests in cases where a suitable showing of need can be made. Bonneville emphasized the potential of transmitted signal reflection, resulting in multipath effects and television picture ghosting. Bonneville asserts that the proposed rule amendment would permit the routine authorization of television stations that may not be able to attain the deep nulls required of their antenna systems, thereby resulting in defective service area coverage and increased interference potential. Thus, Bonneville and the NAB strongly oppose any change to the current restrictions for maximum-to-minimum antenna radiation ratio in order to control reflection interference and maintain the quality of the television broadcast service.

27. MST expresses concerns similar to those of NAB and Bonneville. MST also notes the sufficiency of the current waiver request process. It observes that the Commission has granted waivers of the maximum suppression rule in certain situations, especially in the case of antennas located on the seacoast or on the edge of a mountain range, and agreed that these are appropriate circumstances for waivers. MST asserts that these circumstances depict areas that are unpopulated; thus, causing harm to no one, should reflection problems occur. MST also suggests that the proposal could encourage the use of directional antennas as an allocation tool. It further references the abovementioned FM proceeding as the basis for that concern. MST argues that adoption of the proposal would ignore the realities of signal reflection and establish the concept that the designed radiation pattern, particularly in deep nulls, represents the actual transmitted signal. Once this principle is established, MST believes that many applicants inevitably will argue that these antenna patterns

should apply equally in short-spacing situations. Moreover, MST notes that signal reflections into the suppressed signal area could indeed cause interference to the "protected" station where no interference is predicted to occur, rendering such protection illusory.

28. While the *Notice* in this proceeding never contemplated the use of directional antennas to justify short-spaced TV station assignments, the comments of MST and Lahm and others on this matter clearly evidence their concern, since a limited degree of short-spacing is now under consideration for FM station assignments in MM Docket No. 87-121.[16] That proceeding also proposes a similar rule amendment for antenna radiation pattern suppression. However, our proposal to eliminate the maximum directional TV station antenna signal ratios in this proceeding was not intended to allow short-spacing. The questions raised in the *Notice* simply sought to obtain detailed comment on the current antenna directivity ratios, directional TV station antenna performance and related signal reflection concerns. Some similarity in the two proceedings must be expected, since both deal with the issue of appropriate use of directional antennas. However, in both cases we have sought to develop a comprehensive technical record before making any changes in directional antenna suppression standards that might affect co-channel and adjacent channel interference.

29. We have received little factual information in this proceeding particularly in relation to the actual performance of antennas employing extreme suppression. Therefore, because of uncertainty regarding the stability from such antenna systems, and the continuing availability of the case-by-case waiver process, we have concluded that retention of the current regulation is the best course of action possible at this time. There is some evidence in the record that some relaxation of this rule may be warranted, but the record is insufficient to permit us to determine the appropriate degree. Accordingly, we believe we should await the conclusion of the FM broadcast directional antenna proceeding (since the technical problems and solutions associated with FM and TV directional antennas are likely to be similar) and to revisit this matter at some appropriate time in the future.

Equipment installation safety specifications

30. The *Notice* also proposed to remove outdated rules concerning equipment installation safety specifications. The specific provisions at issue are Sections 73.687(d),(e),(f) and (h), which contain requirements for the construction and installation of transmission systems and studio equipment, and other safety procedures. The *Notice* explained that these safety requirements were written years ago when many broadcasters designed and built their own facilities. Today, nearly all acquisition of equipment by broadcasters is from manufacturers who must design it to meet safety requirements such as the National Electrical Code and other standards imposed by various regulatory agencies and independent organizations, *e.g.*, OSHA (Occupational Safety and Health Administration) and UL (Underwriters Laboratories).

31. In general, the comments supported this proposal. Lahm & Associates considers the present rules to be, in some respects, more dangerous with regard to electrical safety than having no rules at all. Lahm notes that many licensees may believe that the Commission is the primary source of all regulations, including safety matters, pertaining to their broadcast equipment; and may mistakenly assume that the provisions of specific Commission requirements preempts regulation by local, state, or other Federal authorities. Lahm, however, agreed with the assertion, as stated in the *Notice*, that the present installation and safety requirements in Section 73.687 are redundant and outdated.

32. While largely agreeing with Lahm, NAB suggested that when it comes to operator safety, redundant requirements for adherence to safety precautions may be appropriate public policy. Thus, both NAB and Lahm suggested that some reference to safety requirements in the rules is desirable so that licensees will not mistakenly assume that the Commission's silence preempts the requirements of other authorities.

33. In conclusion, we expect other more knowledgable agencies to continue to establish appropriate safety standards. Thus, we see no need to duplicate that effort. We also agree with the commenters that while there appears to be little need for the Commission to require appropriate safety procedures, our rules should contain some reference to other appropriate safety agencies. Therefore, Section 73.687 will be amended with appropriate cautionary language as a reminder to licensees of their responsibility to adhere to all applicable safety precautions.

Reference table of minutes and seconds converted to decimal parts of a degree.

34. Lastly, the *Notice* proposed to delete from the rules Table I of Section 73.698. This table contains conversions for minutes-to-decimal and seconds-to-decimal parts of a degree. They were originally placed in the rules to provide the means for consistent and accurate calculations before the advent and widespread availability of electronic calculators and computers. These values may be used in the calculation of geographical distance separations between broadcast station assignment locations. The comments supported this proposal and agreed that the table has become superfluous and no longer needed because of the universal availability of electronic calculators and computers that provide far more accuracy. For this reason, we are removing this table from the Commission's Rules as proposed.[17]

REGULATORY FLEXIBILITY FINAL ANALYSIS

35. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The regulations affected by this action were enacted when the television broadcast industry was in its early stages of development. Since then, advancements in technology have occurred and the industry in general has matured and grown more competitive. In view of the technical advancements and increased competition, this action is appropriate as a means of updating television standards and policies.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were received in response to the Initial Regulatory Flexibility Analysis.

III. ***Significant alternatives considered and rejected:***

The Commission considered all of the alternatives raised in this proceeding, including the deletion of certain requirements as proposed in the *Notice*, the retention of the current requirements, and the deletion of certain requirements only in certain defined circumstances. The Commission further considered all other timely filed comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission believes the course of action explained herein appears best calculated to eliminate unnecessary regulatory requirements, yet preserve the appropriate role of federal, state, and local regulatory authorities, and promote rapid and efficient communications to the public.

36. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

37. The rule amendments contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

ORDERING CLAUSE

38. Accordingly, IT IS ORDERED THAT pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, Part 73 of the Commission's Rules and Regulations ARE AMENDED as set forth in the Appendix below, effective **April 13, 1989.** IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

39. Further information on this proceeding may be obtained by contacting Bernard Gorden, Mass Media Bureau at (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.208 is amended by deleting paragraphs (c)(1)(i) and (ii) and revising paragraph (c)(1) to read as follows:

§ 73.208 Reference points and distance computations.

* * * * *

(c) * * *

(1) Convert the latitudes and longitudes of each reference point from degree-minute-second format to degree-decimal format by dividing minutes by 60 and seconds by 3600, then adding the results to degrees.

* * * * *

3. 47 CFR 73.653 is revised in its entirety to read as follows:

§ 73.653 Operation of TV aural and visual transmitters.

The aural and visual transmitters may be operated independently of each other or, if operated simultaneously, may be used with different and unrelated program material.

4. 47 CFR 73.663 is amended by revising paragraph (b)(3) to read as follows:

§ 73.663 Determining operating power.

* * * * *

(b) * * *

(3) The meter must be calibrated with the transmitter operating at 80%, 100%, and 110% of the authorized power as often as may be necessary to maintain its accuracy and ensure correct transmitter operating power. In cases where the transmitter is incapable of operating at 110% of the authorized power output, the calibration may be made at a power output between 100% and 110% of the authorized power output. However, where this is done, the output meter must be marked at the point of calibration of maximum power output, and the station will be deemed to be in violation of this rule if that power is exceeded. The upper and lower limits of permissible power deviation as determined by the prescribed calibration, must be shown upon the meter either by means of adjustable red markers incorporated in the meter or by red marks placed upon the meter scale or glass face. These markings must be checked and changed, if necessary, each time the meter is calibrated.

5. 47 CFR 73.687 is amended by revising paragraph (d), and removing paragraphs (e), (f) and (h), and redesignating paragraph (g) as (e) to read as follows:

§ 73.687 Transmission system requirements.

* * * * *

(d) The construction, installation, and operation of broadcast equipment is expected to conform with all applicable local, state, and federally imposed safety regulations and standards, enforcement of which is the responsibility of the issuing regulatory agency.

* * * * *

6. 47 CFR 73.698, Tables, is amended by deleting in its entirety Table I.

7. 47 CFR 73.699, Figure 6, is amended by revising Note 8 to read as follows:

§ 73.699 TV engineering charts.

* * * * *

Figure 6, Television Synchronizing Waveform for Color Transmission

NOTES

* * * * *

8. It is recommended that color bursts signal be omitted during monochrome transmission.

* * * * *

8. 47 CFR 73.4272 is removed in its entirety.

FOOTNOTES

[1] *See Report and Order* in General Docket No. 83-114, 99 FCC 2nd 903 (1984). The results of that proceeding led to a series of rule making actions in which many of the technical regulations were deleted if they were found to be prescriptive of outdated or unwarranted specifications. In addition, those technical regulations that required stations to meet certain signal quality performance levels were usually eliminated in favor of allowing competitive marketplace incentives to influence the quality of the signal to the listening or viewing public. However, those regulations which act to control interference among stations have been consistently retained.

[2] *See Notice of Proposed Rule Making*, 3 FCC Rcd. 2480 (1988).

[3] The Commission also received a Motion to Accept Late-Filed Comments from Richard D. Bogner and Leonard H. King, licensees or permittees of a number of Low Power Television stations throughout the United States, which emphasizes the benefits that video-only or aural-only broadcasting could afford low power TV stations. We are accepting these late-filed comments because their thrust is consistent with the comments of the other parties, differing only with respect to the positive impact the proposed rule changes would be likely to have on low power TV stations. These comments have called our attention to the fact that the language in the proposed rules was in reality somewhat more restrictive than we intended. Thus, we believe our acceptance of these late-filed comments is warranted as the basis for resolving an apparent ambiguity in the proposed rules. This rule change is therefore largely editorial in nature, and is consistent with the arguments advanced by those filing timely comments.

[4] *See* Section 73.653(b) and (c).

[5] *See Report and Order*, MM Docket No. 80-10, Operation of Visual and Aural Transmitters of TV Stations, 45 Fed. Reg. 63857, September 26, 1980.

[6] The "direct method" of power determination for a television visual transmitter involves the use of an RF power output meter connected directly to the output terminals of the transmitter.

[7] The color burst is a special synchronizing signal, transmitted within the television picture signal, that enables the TV receiver to decode the color information for proper display on the screen. During the transmission of black-and-white video programming, color burst signals do not benefit reception. In fact, they have the potential to degrade the picture quality if transmitted along with a low intensity black-and-white picture signal. Thus, the rules currently require that the color burst signal be omitted during the extended transmission of black-and-white programming. *See* Omission of the color burst, *Memorandum Opinion and Order*, 58 FCC 2d 385, adopted March 9, 1976. Also, *see Report And Order*, Rules Governing Color Television Transmission, in Docket No. 10637, 18 FR 8649, December 23, 1953.

[8] INTV reports that when editing a taped program, it is desirable that the original tape have a color burst present so that the time base correctors associated with each tape machine can perform properly during the editing session by making clean edits without any visible glitches or timing errors. Thus, when the color burst is absent from the original tape, it must be added to the program tape before the tape machine can properly edit the material. It should also be noted that most modern tape machines are not capable of deleting the color burst.

Also, if a black and white program or movie is not available on 1 inch tape, it is usually distributed on 16 mm film. This small image size often causes scratches and dirt splotches to appear larger and more visible to the viewer. New film camera devices, such as the Rank ADS-1, can electronically eliminate dirt and scratches by using the Rank dirt concealment circuit. However, this technology requires that a color burst signal be present for the proper operation of the signal storage circuitry of the Rank ADS-1 film chain. Thus, as with black and white programs on 1 inch tape with color burst present and the use of sophisticated processing equipment in the transmitter path, the transferred black and white program must go through additional steps in order to eliminate the color burst to meet the requirements of Section 73.699, Figure 6, Note 8 of the Commission's Rules.

[9] PBS states that monochrome programming is of special importance to public television, as black and white archival tape and other material play an important role in the historical, documentary, and similar informational programming for which public television is noted. Public television stations may also rely on vintage black and white television programs to a greater extent than do commercial programmers. Much of this programming is now available on videotape through syndicators, and the tape productions often contain the color burst signal.

[10] The National Television Systems Committee (NTSC) standard which currently defines the technical standards relating to television broadcasting in the United States, was adopted by the Commission in 1953, in Docket 10637.

[11] This technique is described in an article titled "Improving NTSC to Achieve Near-RGB Performance," by Yves Faroudja and Joseph Roizen, in SMPTE Journal, August 1987. This article describes a completely new theoretical approach to NTSC encoding and decoding which may diminish the effects of cross color modulation and other undesired artifacts.

[12] The Commission took a similar approach when it amended Note 19 to Figure 6 and Note 12 to Figure 7 in Section 73.699, which made the maximum horizontal and vertical blanking intervals recommended values instead of required absolute operating parameters. *See Report and Order* in BC Docket No. 79-145, FCC 84-548, released November 23, 1984.

[13] In a *Memorandum Opinion and Order*, FCC 76-223, adopted March 9, 1976 (58 FCC 2d 385), the Commission clarified the application of the color burst omission requirement.

[14] UHF stations operating with 1 kW or less are not limited to any maximum-to-minimum radiation pattern ratio.

[15] *See* MM Docket No. 87-121, *Notice of Proposed Rule Making*, released March 30, 1988, FCC 88-73, 3 FCC Rcd 1820 (1988), which proposes authorization of short-spaced FM station assignments through the use of directional antenna systems.

[16] Use of directional antennas for allocation purpose is not envisioned in the *Notice* however.

[17] Section 73.208(c)(1) refers to Table I of 73.698 for calculating FM assignment distance separations. For the same reasons as given above, the conversion data in Table I is not needed for FM assignment distance calculations. Consequently, we are also deleting the reference in Section 73.208(c)(1) to Table I in 73.698.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 82-243

In the Matter of

Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz.

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 9, 1989; Released: February 28, 1989

By the Commission:

INTRODUCTION

1. This *Second Report and Order* amends Parts 1, 21, 22, 74, and 94 of the Commission's Rules to specify technical standards, licensing requirements, and coordination procedures for fixed service usage of the 932-935 MHz and 941-944 MHz bands. The greater part of the allocation is being designated for point-to-point use, with some spectrum for point-to-multipoint (multiple address) use. The technical standards being implemented for both Federal Government and non-Government users are similar to those currently in use in non-Government private operational fixed bands. Coordination between Government and non-Government users will be accomplished via the Interdepartment Radio Advisory Committee (IRAC) of the National Telecommunications and Information Administration (NTIA). Licenses will be granted to qualified applicants initially via a one-week filing window, and thereafter on a first-come, first-served basis. In the event of mutually exclusive applications, lotteries will be used to select the applicants to be licensed.

BACKGROUND

2. In 1979, the NTIA advised the Commission of a Federal Government requirement for additional spectrum for low capacity fixed systems. In response, the Commission adopted a *Notice of Proposed Rule Making* proposing that six megahertz of 900 MHz reserve band spectrum be allocated for this purpose, and further proposing that non-Government users be allowed to share the allocation.[1] A *Further Notice of Proposed Rule Making* proposed a minor change in the bands to be used for the fixed service due to other proposals to use various segments of the 900 MHz reserve spectrum.[2] In the *First Report and Order*, the bands 932-935/941-944 MHz were allocated for Government and non-Government fixed service usage on a co-primary basis. In addition, we stated that non-Government common carrier, existing fixed broadcast auxiliary, and private operational fixed users would be eligible to share the bands under Parts 21, 74, and 94 of our Rules.[3]

3. A *Third Notice of Proposed Rule Making* (*Third Notice*) proposed procedures and rules to be followed in sharing the 932-935/941-944 MHz bands between Government and non-Government users.[4] Specifically, the *Third Notice* proposed two alternative application processing procedures to provide equitable access to the new fixed bands to both Government and non-Government entities. Under the first alternative, the essential features of the current Government and non-Government procedures would be retained. Government applications would continue to be submitted to the NTIA using a one-day filing window, and non-Government applications would continue to be submitted to the Commission using a 30-day filing window. Both types of applications would be placed on the agenda of NTIA's IRAC/Frequency Assignment Subcommittee (FAS) and on a public notice to be released by the Commission. In the event of mutually exclusive applications, lotteries would be used to grant licenses. However, due to the different filing window periods, complex mutually exclusive situations could arise.

4. As a way of avoiding the complexities of this processing procedure, a second alternative was set forth, wherein the 30-day non-Government filing window would be reduced to a single day, consistent with the procedure employed by the NTIA for Government applications. This modification would allow consideration of mutually exclusive Government and non-Government applications only when filed on the same day. All other aspects of the procedure would be the same as under the first alternative.

5. Under either alternative, we proposed allowing interested parties 30 days to file objections to an application based on a showing of technical incompatibility with a pending or approved frequency assignment. We proposed making all non-Government assignment information available to Government agencies through the FAS, and placing both Government and non-Government applications on an FCC Public Notice, with the exception of classified Government information. Classified information would be made available to the Commission's FAS representative with the affected Government agency's concurrence.

6. We also proposed a channeling plan and technical standards in an attempt to guide efficient use of the new fixed bands. The channeling plan provided sixteen 25 kHz channel pairs, four 50 kHz pairs, six 100 kHz pairs, and nine 200 kHz pairs for point-to-point use. The interference protection criteria proposed for new fixed users, as well as existing grandfathered broadcast auxiliary stations that utilize the 942-944 MHz band, was that specified in Section 94.63 of the Rules.

7. No point-to-multipoint use of the new fixed bands was proposed. However, it was noted that paired private multiple address frequencies at 928-929/952-953 MHz are becoming saturated in some areas; therefore, comments were requested on whether there is a need for point-to-multipoint use which should be satisfied in this allocation. Comments were also requested on the relative demand for 900 MHz non-Government fixed operations between common carriers and private users.

8. A total of eight parties filed comments to the *Third Notice*, with six parties filing reply comments. A list of commenters may be found in Appendix A. The comments and our decisions on the substantive issues are discussed below.

DISCUSSION AND DECISIONS

Permitted Services

9. The Government strongly advocates using the entire 900 MHz fixed allocation in point-to-point applications. However, all commenting parties that addressed the area of permitted services supported a designation of some frequencies for point-to-multipoint use, citing the rapid growth which has occurred and the shortage of frequencies which presently exists in that service. Motorola, Inc. and the Utilities Telecommunication Council (UTC) said that the majority of the allocation should be used in point-to-point applications, but with a portion for point-to-multipoint use. Motorola recommended 4.8 megahertz for point-to-point use and 1.2 megahertz for point-to-multipoint use. UTC recommended that the majority of frequencies should be designated for point-to-point use by private operational-fixed (Part 94) entities, but that some frequencies should also be designated for Part 94 multiple address use. UTC indicated that it is more appropriate to satisfy general Part 94 multiple address needs in this proceeding rather than in Docket 87-5.[5] The Central Station Electrical Protection Association (CSEPA) also supported the need for additional multiple address frequencies for the alarm industry.

10. The American Petroleum Institute (API) stated that at least 25 percent of the allocation should be devoted to point-to-multipoint use, but that common carriers should be precluded for three years, due to serious shortages among private operational-fixed users. However, Gencom Incorporated and Omni Communications, Inc. (Gencom/Omni), in a joint filing, said that there was a need for one megahertz of point-to-multipoint spectrum for use in common carrier transmitter control operations under Part 22 of the Rules. Gencom/Omni stated that the Commission has made many common carrier paging channels available, but has not made sufficient concomitant control channels available, especially in the area of wide area simulcasting.

11. We concur with the commenting parties that the allocation should provide for some point-to-multipoint use. The commenters suggested that between 1.2 and 1.5 megahertz be designated for point-to-multipoint. On the other hand, considerable demand has been shown for point-to-point by the commenters. Further, the Government has consistently indicated that it requires six megahertz for point-to-point operations.[6] On balance, we are herein designating five megahertz of spectrum for point-to-point use and one megahertz of spectrum for point-to-multipoint use. Inasmuch as both private users (Part 94) and common carriers (Parts 21 and 22) have point-to-point and point-to-multipoint requirements, we are authorizing equal access for each type of user. Common carriers will apply under Part 21 for point-to-point frequencies, and under Part 22 for point-to-multipoint frequencies.

Coordination and Licensing Procedures

12. *Separate Frequency Pools*. Motorola stated that the proposed coordination and licensing procedures are unduly complex because they necessitate sharing among three distinct groups with differing licensing procedures--Federal Government users, private non-Government users, and common carrier non-Government users. Motorola said that regardless of what methodology for coordination is adopted, coordination will be cumbersome and work to the advantage of the non-Government applicant. Motorola contended that Government entities generally do not have the full complement of manpower and fiscal resources to assess needs and be fully competitive with non-Government entities in a timely manner. Motorola therefore recommended that separate three megahertz Government/non-Government frequency pools be established for at least three years with interpool sharing allowed on a case-by-case basis. According to Motorola, this plan would ensure that both Government and non-Government users would be afforded equitable access to the 932-935/941-944 MHz bands and would be much less administratively burdensome.

13. We believe that our proposal to allocate all of the new fixed channels to Government and non-Government users on a co-equal, shared basis is appropriate. Motorola's proposal to establish separate frequency pools would avoid need for coordination, but at the expense of efficient spectrum utilization. For example, there might be strong demand for channels by Government users in one area and by non-Government users in another. If separate pools were established, channels could be exhausted in one pool while channels remain available in the other. We recognize that procedures could be implemented to allow interpool sharing, as is done frequently in the private radio services. However, interpool sharing would require development of the very coordination procedures we are attempting to establish at this time. Thus, Motorola's suggestion would merely delay development of procedures that would be needed inevitably to achieve full spectrum utilization. We believe that, since such a procedure is inevitable, it should be applied to all frequencies in this band to optimize spectrum utilization to the benefit of Government and non-Government users. Accordingly, we are establishing coordination procedures that allow access to all frequencies for both user groups.

14. We also reject Motorola's contention that Government agencies will be at a disadvantage in obtaining frequencies. Almost all agencies have a telecommunications department which is in charge of assessing radio frequency needs and advising the agency head of spectrum requirements. Government agencies, like private companies, employ a time horizon of several years in planning for future requirements. We anticipate that Government agencies will be active participants in the frequency applications process in a timely manner, similar to non-Government entities.

15. *Filing Window*. API stated that the proposed one-day filing window would be acceptable for all point-to-point applicants, since they are unlikely to be mutually exclusive with respect to coverage areas; however, to the extent that point-to-multipoint frequencies are authorized, API stated that the filing window should remain 30 days for non-Government users, so as not to penalize mutually exclusive applications which arrive late due to slow mail delivery. UTC supported API's position.

16. We anticipate that in most instances sufficient frequencies will be available to satisfy requests for assignments well into the future. Accordingly, it is our intent to fashion filing procedures that enable expeditious processing of applications. Moreover, we seek to avoid encouraging the filing of competing applications to either meet speculative future spectrum needs or to prevent an earlier-filed application from being granted. Such applications would only frustrate our licensing processes with little or no public benefit. With these principles in mind, we believe that a one-day filing window, as proposed, is generally appropriate. We recognize that we are likely to receive a large number of applications when the filing window is first opened. Since, as suggested by API, it may be difficult to ensure mail delivery to the Commission of an application on a specific day, we have decided to open an initial one-week filing window. This will ensure that initially all applicants will have a fair opportunity to apply. After this initial filing period, we believe that a one-day filing window should suffice. Aside from these special provisions, and the minor adjustments indicated below, all the normal procedures for common carrier and private radio applications will be followed.

17. We are therefore establishing an initial one-week filing window that shall apply to both point-to-point and point-to-multipoint Government and non-Government applications. Public notice of the filing period shall be given by the Commission, and notice shall also be published in the Federal Register at least thirty days prior to the beginning of the filing period. All non-Government applications shall be filed in accordance with the Commission's Rules for either private (Part 94) or common carrier (Parts 21 and 22) applicants, as detailed in the public notice. All Government applications shall be filed with the NTIA. All applications shall be listed on an FCC public notice. Oppositions may be filed in accordance with the existing rules. Subsequently, the Commission and the NTIA, through the IRAC/Frequency Assignment Subcommitee, shall grant as many applications as possible, and the Commission shall issue a public notice listing all the applications that have been granted either by itself or the NTIA. This public notice shall also establish a filing date for when the Commission and the NTIA will begin to accept applications for remaining frequencies.

18. From this filing date forward, applications shall be processed on a daily first-come, first-served basis, rather than via a one-week filing window. We see no need to continue the one-week filing window after the initial period, because we anticipate the volume of applications will be considerably less once pent-up demand for 900 MHz fixed frequencies is satisfied. In all other respects, applications shall be treated in the usual manner. These filing procedures will eliminate the need for lotteries except when mutually exclusive applications are filed during the initial filing period or, thereafter, on the same day.

19. *Other Coordination and Licensing Matters.* In its comments, UTC stated that the proposal to submit all non-Government applications to the IRAC for review would create processing delays. UTC further contended that because some information on certain Government operations may be classified, sharing will be made difficult and additional delays may result.

20. We appreciate the desire for prompt processing of applications. The current IRAC coordination procedure normally takes an average of 20 days. We believe this processing time is reasonable and reject UTC's assertion that coordination will create excessive delays. We also reject UTC's contention that the classification of information will make sharing difficult or create delays. The classification of information is done only when essential. We do not anticipate that classification of information will occur frequently in the new fixed bands.

21. The National Association of Broadcasters (NAB) stated that the Commission should provide NTIA with a list of frequency coordinators for broadcast auxiliary services. Also, NAB requested that the Commission disclose how its FAS representative may be contacted.

22. The Commission's FAS representative will exchange all relevant frequency coordination information with other members of the Subcommittee, including the names of coordinating organizations. We anticipate that frequency coordinators--broadcast auxiliary, private, and common carrier--will play an important role in maximizing the use of the new fixed bands. The FCC representative is the Chief, Frequency Liaison Branch, Office of Engineering and Technology.

23. In summary, we are adopting rules wherein Government and non-Government entities will have co-equal access to the new fixed bands, and all acceptable applications will appear on a public notice to be issued by the Commission after consideration with the NTIA. Following issuance of this public notice, 30 days will be allowed for technical objections to be filed to any application. The Commission, in concert with the NTIA, through the IRAC/FAS, will then consider all acceptable applications and will grant as many as possible. To the extent that there are mutually exclusive applications, lotteries will be used to select licensees. These procedures, we believe, will ensure both fairness and maximum information availability to the public.

Channeling Plan

24. Our proposed channeling plan contemplated fixed point-to-point use only. Thus, there is a need to change the proposed plan to permit point-to-multipoint use as well. Of the commenting parties, Motorola and Multipoint Networks (Multipoint) offered the most detailed channeling plans. Motorola recommended that there be three basic groups, consisting of: forty-eight paired point-to-multipoint channels using 12.5 kHz, twenty-two paired point-to-point channels using 100 kHz, and sixteen single point-to-point channels using 12.5 kHz. Also, it said that if 25 kHz, 50 kHz, or 200 kHz channels are needed, 12.5 kHz or 100 kHz channels could be combined to form a wider channel.

25. Multipoint offered a channeling plan that would make thirty-one 25 kHz channel pairs available for point-to-multipoint use, with the lower sixteen channel pairs to be used at data transmission rates of more than 4,800 bits per second (bps), or alternatively, split into 12.5 kHz channel pairs for use at data rates of 4,800 bps or less. The upper fifteen channel pairs would be designated for use only at data rates of more than 4,800 bps. The remaining channels would be designated for point-to-point use, including six 100 kHz channel pairs and eight 200 kHz pairs. ACC Raymart Corporation supported this channeling plan. Bydatel Corporation stated that a portion of the allocation should be set aside for point-to-multipoint systems which operate at 9,600 bps or higher

on a 25 kHz channel, and Communications Carrier, Inc. said that a portion should be used for the transmission of digital information at 19,200 bps.

26. Gencom/Omni offered a channeling plan only for the one megahertz of spectrum that they recommended be used for point-to-multipoint common carrier paging control purposes. They proposed that the 934.5-935.0/943.5-944.0 MHz bands be so designated, using 25 kHz channeling, thereby creating twenty channel pairs. API proposed that for any point-to-multipoint allocation, a mixture of 12.5 kHz and 25 kHz channels be used. It also suggested that the channeling plan should permit different bandwidths for point-to-point use, and should also permit applicants to specify narrower bandwidths to conserve spectrum when only wideband channels remain available in a given geographic area.

27. We believe that a mix of 25 kHz, 50 kHz, 100 kHz, and 200 kHz channels is appropriate for point-to-point use, since there is a wide variation in information transmission requirements for this type of use. We are establishing 12.5 kHz channels for point-to-multipoint use since it appears that most requirements for this type of use can be accommodated in a 12.5 kHz channel. We note that 12.5 kHz channels were recently established in PR Docket No 87-5 for point-to-multipoint service. To permit flexibility, applicants for either point-to-point or point-to-multipoint channels will be permitted to combine channels upon a showing that there is a need and sufficient frequencies are available to permit this. Applicants may split channels if they choose to do so. We do not believe that it would be efficient to specify data rates in the point-to-multipoint service as requested by several commenters, since the particular usage under consideration will determine the most appropriate transmission rate. We also will not designate any spectrum for either private or common carrier usage on a primary basis, since we believe the market can better make this determination.

28. Specifically, we are designating fourteen 25 kHz channel pairs, three 50 kHz channel pairs, six 100 kHz channel pairs, and seven 200 kHz channel pairs for point-to-point use, and forty 12.5 kHz channel pairs for point-to-multipoint use (*See* Appendix B). This plan represents a compromise between our original proposal, which reflected the strong Government point-to-point requirement, and the consensus of the commenters, which reflected the strong non-Government point-to-multipoint requirement. Under the plan, all channels can be assigned in a geographic area; i.e., this is not an interstitial channeling plan, wherein the assignment of a channel of a given bandwidth may preclude the assignment of a channel of another bandwidth. In addition, we will not permit point-to-point users to access point-to-multipoint channels or vice-versa, due to technical problems such cross-use might create. The bands are primarily intended for two-way use, but requests to utilize half of a channel pair to satisfy a single channel requirement will be considered upon a showing that spectrum efficiency will not be impaired, and that unpaired spectrum is not available in other bands.[8]

Technical Standards

29. Our proposal to utilize existing criteria specified in Section 94.63 of the Rules to protect new fixed users from interference in the 932-935/941-944 MHz bands was addressed by only three parties. Motorola stated that our proposed transmitter frequency tolerance of 2.5 parts per million (ppm) was appropriate except for 12.5 kHz channels. It stated that 1.5 ppm is necessary for 12.5 kHz channels, since 2.5 ppm can lead to adjacent channel interference and on-channel desensitization that severely degrades performance. Multipoint and API supported the use of a 1.5 ppm frequency tolerance for 12.5 kHz channels. Motorola also recommended that the Commission apply the emission roll-off standards used in the 896-902 MHz bands under Part 90 of the Rules to any Part 94 12.5 kHz channels that are created in this proceeding.

30. We concur with Motorola, Multipoint, and API that our adoption of 12.5 kHz channels in this proceeding necessitates some adjustment in our proposed technical standards for these narrower bandwidth channels. In PR Docket 87-5, we adopted a 1.5 ppm frequency tolerance for 12.5 kHz point-to multipoint channels and Part 90 emission roll-off standards for all point-to multipoint channels.[9] Therefore, we will also adopt these same standards here for the forty paired 12.5 kHz point-to-multipoint channels. In all other respects, our technical standards for new fixed users of the 932-935/941-944 MHz bands will be those currently in use in the 900 MHz private radio bands; *i.e.*, we will use a transmitter frequency tolerance of 2.5 ppm for channels of between 25 kHz and 200 kHz, and emission, power, and antenna limitations as specified in Appendix B.

31. In the *Third Notice*, we also proposed to utilize Section 94.63 of the Rules to protect existing broadcast fixed auxiliary users in the 942-944 MHz bands from interference caused by new fixed users of the band. This proposal was addressed by two parties. NAB and radio station KFAC-FM (Los Angeles) stated that the criteria specified in Section 94.63 are inadequate to protect high-quality radio broadcast Studio-to-Transmitter Links (STLs) from interference. NAB stated that under Section 94.63(b) an STL receiver could be steadily degraded by one dB increments for each new fixed operation. KFAC concurred with NAB, and said that it operates a diffracting (non line-of-sight) STL on a center frequency of 943.0 MHz which is particularly vulnerable to interference. To remedy this problem, NAB and KFAC recommended that STLs receive protection from the aggregate effect of interfering sources, not the incremental effect of each new source as it comes on line. NAB and KFAC also stated that the noise power bandwidth specified in Section 94.63--300 to 3,400 hertz[10] --is inappropriate for the wideband broadcast programming carried by aural STLs. NAB recommended a criterion of a demodulated audio bandwidth of 50 to 15,000 hertz in either the left or right audio channel to assure non-interference to the high-quality audio transmitted by STLs.

32. The standards referred to by NAB and KFAC-FM are those for systems using multiple voice channels. Since STLs employ a single voice channel, the pertinent requirements are the general technical standards in paragraph (d)(3) of Section 94.63. This paragraph requires 90 dB of protection for co-channel interference and 56 dB for adjacent channel interference. These standards are very conservative and we believe they are adequate to protect STLs against interference, even taking into account the bandwidth of STL transmissions and the possibility of multiple potential sources of interference. If these standards are shown to be insufficient, we invite standards organizations, such as the Electronic Industries Association, the Institute of Electrical and Electronics Engineers, Inc., the American National Standards Insti-

tute, or any other recognized authority, to develop alternative standards. In addition, we point out that any new fixed operations must be frequency coordinated with existing STLs. Existing STLs will thus have an opportunity to raise any specific interference concerns they may have through the frequency coordination process.

REGULATORY FLEXIBILITY ACT -- FINAL ANALYSIS

33. Pursuant to 5 U.S.C. Section 601 *et seq.*, an Initial Regulatory Flexibility Analysis was incorporated in the *Third Notice of Proposed Rule Making* in General Docket No. 82-243. Written comments on the proposals in the *Third Notice*, including the Regulatory Flexibility Analysis, were requested.

34. *Need for and Objective of Rules.* Our objective has been to accommodate growth in Government and non-Government fixed service use. We have established a sharing arrangement which provides equitable access to the new fixed bands to both types of users.

35. *Issues Raised by the Public in Response to the Initial Analysis.* No commenting party specifically responded to our request for comments on the Initial Regulatory Flexibility Analysis. However, several parties suggested designating a portion of the allocation for point-to-multipoint use. As a result of these comments, we have modified our channeling plan to include one megahertz of spectrum for such use.

36. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives.* We have reduced burdens whenever possible. The regulatory burdens we have retained are necessary in order to carry out our duties under the Communications Act of 1934. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. A copy of this *Second Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

37. The rule amendments contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified information collection requirement on the public.

ORDERING CLAUSES

38. Authority for this Rule Making is contained in Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

39. Accordingly, IT IS ORDERED, that Parts 1, 21, 22, 74, and 94 of the Commission's Rules and Regulations ARE AMENDED as specified in Appendix C, below, effective **April 12, 1989.**

40. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

Parties Filing Comments in General Docket No. 82-243, Third Notice of Proposed Rule Making

American Petroleum Institute
Bydatel Corporation
Central Station Electrical Protection Association
Communications Carrier, Inc.
Gencom Incorporated and Omni Communications, Inc. (Joint Comments)
Motorola, Inc.
Multipoint Networks
Utilities Telecommunications Council

Parties Filing Reply Comments in General Docket No. 82-243, Third Notice of Proposed Rule Making

ACC Raymart Corporation
American Petroleum Institute
KFAC-FM
Motorola, Inc.
National Association of Broadcasters
Utilities Telecommunications Council

Appendix B

Paired Frequencies, 932-935/941-944 MHz, Government and Non - Government Fixed Use

TRANSMIT (OR RECEIVE)		RECEIVE (OR TRANSMIT)
	Point - To - Multipoint Use Only	
932.00625		941.00625
.01875		.01875
.03125		.03125
.04375		.04375
.05625		.05625
.06875		.06875
.08125		.08125
.09375		.09375
.10625		.10625
.11875		.11875
.13125		.13125
.14375		.14375
.15625		.15625
.16875		.16875
.18125		.18125
.19375		.19375
.20625		.20625
.21875		.21875
.23125		.23125
.24375	12.5 kHz	.24375
.25625		.25625
.26875		.26875
.28125		.28125
.29375		.29375
.30625		.30625
.31875		.31875
.33125		.33125
.34375		.34375
.35625		.35625
.36875		.36875
.38125		.38125
.39375		.39375
.40625		.40625
.41875		.41875
.43125		.43125
.44375		.44375
.45625		.45625
.46875		.46875
.48125		.48125

.49375		.49375
	Point - To - Point Use Only	
932.5125		941.5125
.5375		.5375
.5625		.5625
.5875	25 kHz	.5875
.6125		.6125
.6375		.6375
.6625		.6625
932.7000	50 kHz	941.7000
.7500		.7500
932.8250		941.8250
.9250	100 kHz	.9250
933.0250		942.0250
933.1750		942.1750
.3750		.3750
.5750		.5750
.7750	200 kHz	.7750
.9750		.9750
934.1750		943.1750
.3750		.3750
934.5250		943.5250
.6250	100 kHz	.6250
.7250		.7250
934.8000	50 kHz	943.8000
934.8375		943.8375
.8625		.8625
.8875		.8875
.9125	25 kHz	.9125
.9375		.9375
.9625		.9625
.9875		.9875

NOTE: This plan is a guide for identifying the center frequency normally used for assignments with necessary bandwidths that can be accommodated within 12.5, 25, 50, 100, and 200 kHz; requirements with necessary bandwidths that cannot be accommodated efficiently within these channels shall be centered so as to maximize spectrum efficiency. The plan provides paired channels for duplex use. Single channel point-to-point use will be permitted only upon a showing that spectrum efficiency will not be impaired and that unpaired spectrum is not available in other bands; single channel point-to-multipoint use will not be permitted.

Technical Standards for 900 MHz Fixed Service

1. The frequency tolerance of transmitters shall be:

932-932.5 MHz and 941-941.5 MHz . . . . 1.5 ppm.
932.5-935 MHz and 941.5-944 MHz . . . . 2.5 ppm.

2. Emission limitations:

(a) For transmissions other than those employing digital modulation techniques, the average power of any emission on any frequency removed from the authorized bandwidth (BW) center by a displacement frequency (fd) shall be attenuated below the mean power output of the transmitter under the following:

fd	(Min) Attenuation
50% BW < fd < 100% BW	25 dB
100% BW < fd < 250% BW	35 dB + 0.3(%BW - 100)
fd > 250% BW	80 dB

(b) For transmissions employing digital modulation techniques:

In any 4 kHz band, the center frequency of which is removed from the assigned frequency by more than 50 percent, up to and including 250 percent, of the authorized bandwidth as specified by the following equation but at least 50 decibels:

$$A = 35 + 0.8(\% - 50) + 10 \log BW$$

where A is the attenuation in decibels below the mean output power level, % is the percent of the authorized bandwidth removed from the assigned frequency, and BW is the authorized bandwidth in megahertz.

Attenuation greater than 80 decibels is not required.

3. Power limitations:

	Maximum allowable transmitter power (Watts)	Maximum allowable EIRP (dBW)
932-932.5 MHz	5.0	+17
941-941.5 MHz	100.0	+30
932.5-935 MHz and 941.5-944 MHz	20.0	+40

4. Directional Antenna limitations:

Category	Maximum beamwidth to 3 dB points (included angle in degrees)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
		5 to 10	10 to 15	15 to 20	20 to 30	30 to 100	100 to 140	140 to 180 (degrees)
A	14.0	. .	6	11	14	17	20	24
B	20.0	. .	6	10	13	15	20	

Appendix C

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. In Section 1.962, paragraph (a)(1) is revised and paragraph (i) is added to read as follows:

Section 1. 962. Public notice of acceptance for filing; petitions to deny applications of specified categories.

(a) * * *

(1) Fixed point-to-point and point-to-multipoint stations using frequencies above 890 MHz (exclusive of control, relay, and repeater stations used as integral parts of mobile radio systems).

* * * * *

(i) Notwithstanding other provisions of this section, applications for frequencies in the 932-935/941-944 MHz bands shall be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis. Applications will be considered to be mutually exclusive only if filed for the same frequency in the same geographic location during the initial filing period or, thereafter, on the same day.

* * * * *

Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21 -- DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303.

2. In Section 21.27, a new paragraph (d) is added to read as follows:

Section 21. 27. Public notice period.

* * * * *

(d) Applications for frequencies in the 932.5-935/941.5-944 MHz bands shall be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis.

3. In Section 21.31, paragraph (g) is added to read as follows:

Section 21.31. Mutually Exclusive Applications.

* * * * *

(g) Notwithstanding other provisions of this section, applications for frequencies in the 932.5-935/941.5-944 MHz bands will be considered to be mutually exclusive only if filed for the same frequency in the same geographic location during the initial filing period or, thereafter, on the same day.

* * * * *

4. In Section 21.101, the table in paragraph (a) is amended by adding the following frequency ranges in numeric order to read as follows:

Section 21.101. Frequency tolerance.

(a) * * *

	Frequency tolerance (percent)		
Frequency range (MHz)	**All fixed and base stations**	**Mobile stations over 3 watts**	**Mobile stations 3 watts or less**
512 to 932 3/	0.0005	0.0005	0.0005
932.5 to 935 3/	0.00025	. . . . .	. . . . .
941.5 to 944	0.00025	. . . . .	. . . . .
944 to 1,000	0.0005	0.0005	0.0005

* * * * *

5. In Section 21.107, the table in paragraph (b) is amended by adding a footnote key-in to the 512 to 2,110 MHz band and changing the footnote to read as follows.

Section 21. 107 Transmitter Power

* * * * *

(b) * * *

Frequency Band	**Maximum Allowable Transmitter Power Fixed (dBW)**	**Mobile**	**Maximum Allowable EIRP Fixed (W) (dBw)**	**Mobile(W)**
512 to 2,110	20.0	20.0	4/	

4/ The EIRP of stations in the 932.5-935 MHz, 941.5-944 MHz, and 10,600-10,680 MHz bands must not exceed +40 dBW.

* * * * *

6. In Section 21.108, the list of frequency bands in paragraph (c) is amended by adding the following new bands in numeric order to read as follows:

Section 21. 108 Directional antennas.

* * * * *

(c) * * *

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points (included angle in degree	Minimum [Table antenna continued dBi) below]
932.5 to 935 and 941.5 to 944	A	14.0	n/a
	B	20.0	n/a

Frequency (MHz) [Continued]	Category [Continued]	Minimin radiation suppression to angle in degrees from centerline of main beam in decibels 5 10 15 20 30 100 140 to to to to to to to 10 15 20 30 100 140 180 (degrees)
932.5 to 935 and 941.5 to 944	A	. . . 6 11 14 17 20 24
	B	. . . . . 6 10 13 15 20

* * * * *

7. In Section 21.701. the list of frequency bands in paragraph (a) is amended by adding the following new bands and footnotes in numeric order, adding a new paragraph (c) and redesignating former paragraphs (c) through (f) as paragraphs (d) through (g) to read as follows:

Section 21. 701. Frequencies.

(a) * * *

932.5-935 MHz 17/.
941.5-944 MHz /17 18/.

17/ Frequencies in these bands are shared with Government fixed stations and stations in the Private Operational-Fixed Microwave Service (Part 94).

18/ Frequencies in the 942 to 944 MHz band are also shared with broadcast auxiliary stations (Part 74).

* * * * *

(c) **932.5-935 MHz and 941.5-944 MHz.** (1) 200 kHz maximum authorized bandwidth. 9 MHz separation:

(1) 25 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.5125	941.5125
932.5375	941.5375
932.5625	941.5625
932.5875	941.5875
932.6125	941.6125
932.6375	941.6375
932.6625	941.6625
934.8375	941.8375
934.8625	943.8625
934.8875	943.8875
934.9125	943.9125
934.9375	943.9375
934.9625	943.9625
934.9875	943.9875

(2) 50 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.7000	941.7000
932.7500	941.7500
934.8000	943.8000

(3) 100 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.8250	941.8250
932.9250	941.9250
933.0250	942.0250
934.5250	943.5250
934.6250	943.6250
934.7250	943.7250

(4) 200 kHz channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
933.1750	942.1750
933.3750	942.3750
933.5750	942.5750
933.7750	942.7750
933.9750	942.9750
934.1750	943.1750
934.3750	943.3750

* * * * *

8. In Section 21.703. the table in paragraph (a) is amended by adding the following bands in numeric order to read as follows:

Section 21.703. Bandwidth and emission limitations.

(a) * * *

Frequency band (MHz)	Maximum authorized bandwidth (MHz)
932.5 to 935	0.2
941.5 to 944	0.2

* * * * *

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22 -- PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303), sec. 553 of the Administrative Procedure Act (5 U.S.C.), unless otherwise noted.

2. In Section 22.27, paragraph (b)(2) is added and paragraph (b) is redesignated as paragraph (b)(1) to read as follows:

Section 22. 27. Public notice period.

* * * * *

(b) * * *

(b)(2) Applications for frequencies in the 932-932.5/941-941.5 MHz bands shall be filed initially during a one-week period to be announced by public notice. After these applications have been processed, the Commission shall announce by public notice a filing date for remaining frequencies. From this filing date forward, applications shall be processed on a daily first-come, first-served basis.

* * * * *

3. In Section 22.31, paragraph (g) is added to read as follows:

Section 22.31. Mutually Exclusive Applications.

* * * * *

(g) Notwithstanding other provisions of this section, applications for frequencies in the 932-932.5/941-941.5 MHz bands will be considered to be mutually exclusive only if filed for the same frequency in the same geographic location during the initial filing period or, thereafter, on the same day.

* * * * *

4. In Section 22.101, the table in paragraph (a) is amended by adding the following frequency ranges in numeric order to read as follows:

Section 22.101. Frequency tolerance.

(a) * * *

	Frequency tolerance (percent)		
Frequency range (MHz)	All fixed and base stations	Mobile stations over 3 watts	Mobile stations 3 watts or less
932 to 932.5	0.00015	.....	.....
941 to 941.5	0.00015	.....	.....

* * * * *

5. In Section 22.501, paragraph (g)(1) is revised, and a new paragraph (g)(5) is added to read as follows:

Section 22.501. Frequencies.

* * * * *

(g) * * *

(g)(1) The frequencies listed in this paragraph are available to one-way signaling stations utilized within a multiple address system which requires the use of at least four simultaneously operated base stations operated on the same frequency assignments. These frequencies will be assigned only when there are four or more remote sites listed on the application for license. The 928/959 MHz frequencies may be used in paired or unpaired configurations; the 932/941 MHz frequencies are for paired use only. When paired, the higher frequency will be used by the control and the lower by the base station.

890-960 MHz BAND 1/ 2/

928.8625	959.8625
928.8875	959.8875
928.9125	959.9125
928.9375	959.9375
928.9625	959.9625
928.9875	959.9875
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125
932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375

932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

1/ Except as indicated above, new control and repeater stations will not be authorized in the 890-940 MHz band. However, stations which were authorized to operate on such frequencies on April 16, 1958, may be granted renewed licenses subject to the following conditions: Operations shall not be protected against any interference received from the emission of industrial, scientific and medical equipment operating on 915 MHz or from the emission of radiolocation stations in the 890-942 MHz band. No harmful interference shall be caused to stations operating in the radiolocation service in the 890-942 MHz band.

2/ The paired frequencies between 932-932.5 and 941-941.5 are shared with Government fixed stations and stations in the Private Operational-Fixed Microwave Service (Part 94).

* * * * *

(g)(5) Stations in multiple address systems on the 941-941.5 MHz channels will not be authorized to use transmitter power exceeding 100 watts nor effective isotropic radiated power exceeding +30 dBW. Stations in multiple address systems on the 932-932.5 MHz channels will not be authorized to use transmitter power exceeding 5 watts nor effective isotropic radiated power exceeding +17 dBW.

* * * * *

Part 74 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 74--EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

1. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082 as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083 as amended; 47 U.S.C. 301, 303, 307.

2. In Section 74.502, a new paragraph (a) is added, former paragraphs (a) through (d) are redesignated as paragraphs (b) through (e) and paragraph (e) is amended to show reference to paragraph (b) in lieu of paragraph (a) to read as follows:

Section 74. 502. Frequency Assignment.

(a) Except as provided in US302, broadcast auxiliary stations licensed as of November 21, 1984, to operate in the band 942-944 MHz may continue to operate on a co-equal primary basis to other stations and services operating in the band in accordance with the Table of Frequency Allocations. These stations will be protected from possible interference caused by new users of the band by the technical standards specified in Section 94.63(d)(3).

* * * * *

Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94--PRIVATE OPERATIONAL - FIXED MICROWAVE SERVICE

1. The authority citation for Part 94 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. In Section 94.61, the table in paragraph (b) is amended by adding the following frequency bands and footnotes in numeric order to read as follows:

Section 94. 61. Applicability.

* * * * *

(b) * * *

932 to 932.5	(32)
932.5 to 935	(33)
941 to 941.5	(32)

941.5 to 944	(32)(33)

(32) Frequencies in the 932 to 932.5 MHz and 941 to 941.5 MHz bands are shared with Government fixed point-to-multipoint stations and point-to multipoint stations in the Public Land Mobile Service (Part 22). Frequencies in these bands are paired with one another and are available for point-to multipoint transmission of the licensee's products and information services, excluding video entertainment material, to the licensee's customers.

(33) Frequencies in the 932.5 to 935 MHz and 941.5 to 944 MHz bands are shared with Government fixed point-to-point stations and stations in the Point-to-Point Microwave Radio Service (Part 21). Frequencies in these bands are paired with one another.

(34) Frequencies in the 942 to 944 MHz band are also shared with broadcast auxiliary stations (Part 74).

* * * * *

3. Section 94.65 is amended by adding a new paragraph (a)(1)(iv) and redesignating former paragraph (a)(1)(iv) as paragraph (a)(1)(v)); by adding a new paragraph (a)(2)(i) and redesignating former paragraphs (a)(2)(i) through (a)(2)(iii) as paragraphs (a)(2)(ii) through (a)(2)(iv) and by adding additional frequency bands in new paragraphs (a)(2)(ii), (a)(2)(iii), and (a)(2)(iv), and redesignating tables 7 through 9 as tables 9 through 11 in these paragraphs.

Section 94.65. Frequencies.

* * * * *

(a)(1)(iii) * * *

(iv) Frequencies listed in this paragraph are shared with stations in the Public Land Mobile Service (Part 22).

Table 7 PAIRED FREQUENCIES
(12.5 kHz bandwidth)

Remote transmit	Master transmit
932.00625	941.00625
932.01875	941.01875
932.03125	941.03125
932.04375	941.04375
932.05625	941.05625
932.06875	941.06875
932.08125	941.08125
932.09375	941.09375
932.10625	941.10625
932.11875	941.11875
932.13125	941.13125
932.14375	941.14375
932.15625	941.15625
932.16875	941.16875
932.18125	941.18125
932.19375	941.19375
932.20625	941.20625
932.21875	941.21875
932.23125	941.23125
932.24375	941.24375
932.25625	941.25625
932.26875	941.26875
932.28125	941.28125
932.29375	941.29375
932.30625	941.30625
932.31875	941.31875
932.33125	941.33125
932.34375	941.34375
932.35625	941.35625
932.36875	941.36875
932.38125	941.38125
932.39375	941.39375
932.40625	941.40625
932.41875	941.41875
932.43125	941.43125
932.44375	941.44375
932.45625	941.45625
932.46875	941.46875
932.48125	941.48125
932.49375	941.49375

* * * * *

(a)(2) * * *

(a)(2)(i) **Table 8 PAIRED FREQUENCIES**
(25 kHz bandwidth)

Transmit (or receive)	Receive (or transmit)
932.5125	941.5125
932.5375	941.5375
932.5625	941.5625
932.5875	941.5875
932.6125	941.6125
932.6375	941.6375
932.6625	941.6625
934.8375	943.8375
934.8625	943.8625
934.8875	943.8875
934.9125	943.9125
934.9375	943.9375
934.9625	943.9625
934.9875	943.9875

* * * * *

(a)(2)(ii) **Table 9 PAIRED FREQUENCIES (50 kHz bandwidth)**

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.7000	941.7000
932.7500	941.7500
934.8000	943.8000

* * * * *

(a)(2)(iii) **Table 10 PAIRED FREQUENCIES (100 kHz bandwidth)**

Transmit (receive) (MHz)	Receive (transmit) (MHz)
932.8250	941.8250
932.9250	941.9250
933.0250	942.0250
934.5250	943.5250
934.6250	943.6250
934.7250	943.7250

* * * * *

(a)(2)(iv) **Table 11 PAIRED FREQUENCIES (200 kHz bandwidth)**

Transmit (receive) (MHz)	Receive (transmit) (MHz)
933.1750	942.1750
933.3750	942.3750
933.5750	942.5750
933.7750	942.7750
933.9750	942.9750
934.1750	943.1750
934.3750	943.3750

* * * * *

4. In Section 94.67, the table is amended by revising the first two rows to read as follows:

Section 94.67. Frequency Tolerance

* * * * *

Frequency band (MHz)	Tolerance as percentage of assigned frequency
928-929, 932-932.5, 941-941.5	0.0005(9)
932.5-935, 941.5-944, 952-960	(1) (5)

* * * * *

5. In Section 94.71, the table in paragraph (b) is amended by adding the following frequency ranges in numeric order to read as follows:

Sections 94.71. Emission and bandwidth limitations.

* * * * *

(b) * * *

Frequency band (MHz)	Maximum authorized bandwidth
932-932.5, 941-941.5	12.5 kHz[1]
932.5-935, 941.5-944	25, 50, 100, 200 kHz 1/

* * * * *

6. In Section 94.73, the table in paragraph (a) is amended by adding the following frequency ranges in numeric order to read as follows:

Section 94.73. Power limitations.

* * * * *

(a) * * *

Frequency band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP 2/
	Fixed (W)	Mobile (W)	Fixed (dBW) Mobile (dBW)
932-932.5	5.0		+17
932.5-935	20.0		+40
941-941.5	100.0		+30
941.5-944	20.0		+40

* * * * *

7. In Section 94.75, the table in paragraph (b) is amended by adding the following frequency ranges in numeric order to read as follows:

Section 94.75. Antenna limitations.

* * * * *

(b) * * *

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points (included angle in degrees)	Minimum [Table antenna continued g ain below] (dBi)
932.5 to 935 and 941.5 to 944	A	14.0	n/a
	B	20.0	n/a

Frequency (MHz) [Continued]	Category [Continued]	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels 5 to 10	10 to 15	15 to 20	20 to 30	30 to 100	100 to 140	140 to 180 (degrees)
932.5 to 935 and 941.5 to 944	A	6	11	14	17	20	24	
	B	6	10	13	15	20		

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, Gen. Docket No. 82-243, 47 Fed. Reg. 23491 (May 28, 1982).

[2] *See Further Notice of Proposed Rule Making*, Gen. Docket No. 82-243, 48 Fed. Reg. 12267 (March 28, 1983).

[3] *See First Report and Order*, Gen. Docket No. 82-243, 50 Fed. Reg. 4650 (February 1, 1985). In a companion *Report and Order* in Gen. Docket No. 82-335, 50 Fed. Reg. 4655 (February 1, 1985), we permitted 121 existing one-way fixed broadcast auxiliary users at 942-944 MHz to remain in this band indefinitely on a grandfathered basis. However, we stated that no new broadcast auxiliary use would be permitted, since these one-way users could create inefficient use of the paired 932-935/941-944 MHz bands.

[4] *See Third Notice of Proposed Rule Making*, Gen. Docket No. 82-243, 2 FCC Rcd 1608 (1987).

[5] The *Notice of Proposed Rule Making* in PR Docket 87-5, released January 29, 1987 (2 FCC Rcd 553 (1987)), proposed to reallocate twenty multiple address Power Radio Service frequency pairs in the 928/952 MHz bands to general private (Part 94) multiple address use. On February 25, 1988, the Commission adopted a *Report and Order* (3 FCC Rcd 1564 (1988)) retaining these frequencies for the Power Radio Service until January 1, 1992, when they will become available to any Part 94 user.

[6] However, on December 16, 1988, William D. Gamble, Deputy Associate Administrator of the Office of Spectrum Management of the NTIA, sent a letter to William R. Torak, Deputy Chief of the Spectrum Engineering Division of the Commission's Office of Engineering and Technology, concurring to the action herein. The letter stated that while the Interdepartment Radio Advisory Committee strongly supported utilizing the entire allocation for point-to-point operations, the NTIA believes that in light of the non-Government requirement for point-to-multipoint operations, "it is in the national interest to proceed with the report and order as submitted by the FCC".

[7] If the mutually exclusive applications are all non-Government, then the Commission shall hold a lottery to choose a successful applicant. If there are a mixture of Government and non-Government applications, then a joint lottery shall be held. In the latter case, the lottery shall determine whether a Government or non-Government entity shall be assigned a channel. Depending on whether it is a Government or non-Government entity, either the NTIA or the Commission, respectively, shall issue the license.

[8] We note that we have recently made available additional unpaired 900 MHz point-to-multipoint spectrum. *See Report and Order*, PR Docket 87-5, *supra*.

[9] *See Report and Order*, PR Docket 87-5, *supra*.

[10] NAB and KFAC each incorrectly stated the range as 300 to 400 hertz in their reply comments.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-322

In the Matter of

Amendment of Section 73.202(b), RM-6267
Table of Allotments,
FM Broadcast Stations.
(Hali'imaile, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1989; Released: March 1, 1989

By the Deputy Chief, Policy and Rules Division:

1. At the request of of Timothy D. Martz (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4275 (1988), proposing the allotment of Channel 288A to Hali'imaile, Hawaii, as the community's first local FM service. Petitioner filed comments reaffirming his intention to apply for the channel, if allotted. No other comments were received. Channel 288A can be allotted to Hali'imaile in compliance with the Commission's minimum distance separation requirements.[1]

2. We believe the public interest would be served by allotting Channel 288A to Hali'imaile, Hawaii, as the community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 31, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hali'imaile, Hawaii	288A

3. The window period for filing applications will open on **April 3, 1989**, and close on **May 3, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 288A at Hali'imaile are 20-52-16 and 156-20-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-316

In the Matter of

Amendment of Section 73.202(b), RM-6269
Table of Allotments,
FM Broadcast Stations.
(Lanai City, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1989; Released: March 1, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 4232 (1988), issued in response to a petition filed by Timothy D. Martz (petitioner), proposing the allotment of Channel 284A to Lanai City, Hawaii, as the community's first local FM service. Petitioner filed comments reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. Channel 284A can be allotted to Lanai City, Hawaii, in compliance with the Commission's minimum distance separation requirements with a site restriction of 2 kilometers (1.2 miles) southeast of the city, to avoid a short spacing to pending applications for Channel 282C at Kaneohe, Hawaii.[1]

3. We believe the public interest would be served by allotting Channel 284A to Lanai City, Hawaii, as that community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 31, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lanai City, Hawaii	284A

4. The window period for filing applications will open on **April 3, 1989,** and close on **May 3, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates for Channel 284A at Lanai City, Hawaii are 20-49-06 and 156-54-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-231

In the Matter of

Amendment of Section 73.202(b),	RM-6131
Table of Allotments,	
FM Broadcast Stations.	
(Mecca, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 30, 1989; Released: March 1, 1989

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 3171 (1988), issued in response to a petition filed by Craig L. Fox (petitioner), proposing the allotment of FM Channel 249A to Mecca, California, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 249A to Mecca, California, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 249A can be allotted to Mecca in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules.[2] Additionally, since Mecca is located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence in the proposal by the Mexican government was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 31, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Mecca, California	249A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 249A at Mecca, California, will open on **April 3, 1989,** and close on **May 3, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although petitioner's comments were not timely filed, because this proceeding is uncontested they will be accepted for the purpose of reaffirming his interest in the proposed allotment.

[2] This determination is made based on the use of city reference coordinates of 33-34-18 and 116-05-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-147

In the Matter of

Amendment of Section 73.202(b), RM-5952
Table of Allotments,
FM Broadcast Stations.
(Los Banos, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 31, 1989; Released: March 1, 1989

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 2258 (1988), issued in response to a petition filed on behalf of Ethnic Radio, Incorporated (petitioner), proposing the allotment of Channel 295A to Los Banos, California, as that community's second local FM broadcast service. Supporting comments were filed by Ethnic Radio of Los Banos, Inc.,[1] ("Ethnic" or "petitioner") reaffirming a continuing interest in the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 295A to Los Banos, California, since it could provide an additional local FM broadcast service to the community.

3. As indicated in the *Notice*, Channel 295A can be allotted to Los Banos in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 31, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Los Banos, California	284B, 295A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Chananel 295A at Los Banos, California, will open on **April 3, 1989,** and close on **May 3, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Ethnic advises that it is the successor in interest of Ethnic Radio, Incorporated.

[2] Reference coordinates used for Channel 295A at Los Banos are the city reference point at 37-03-48 and 120-50-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-253

In the Matter of

Amendment of Section 73.202(b), RM-6162
Table of Allotments,
FM Broadcast Stations.
(Avon, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 26, 1989; Released: March 1, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3639 (1988), proposing the substitution of Channel 276C2 for Channel 276A at Avon, Colorado, and modification of the license of Rocky Wireless, Inc. (petitioner) for FM Station KZYR(FM), Channel 276A, to specify operation on the higher class channel. Petitioner filed supporting comments. No other comments were received.

2. We believe the public interest would be served by substituting Channel 276C2 for Channel 276A at Avon, Colorado, since it could provide a first wide coverage area FM service to the community. Since no other interest was expressed in the Avon proposal, pursuant to Section 1.420(g) of the Commission's Rules we are modifying the license of Station KZYR(FM) to specify operation on Channel 276C2 in lieu of Channel 276A at Avon, Colorado.

3. As stated in the *Notice*, Channel 276C2 can be allotted to Avon at the petitioner's specified site 6.5 kilometers southeast of the community, in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 31, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Avon, Colorado	276C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Rocky Mountain Wireless, Inc. for Station KZYR(FM), IS MODIFIED, effective **March 31, 1989,** to specify operation on Channel 276C2 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reference coordinates are 39-36-58 and 106-26-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-491

In the Matter

Amendment of the maritime services rules concerning the use of digital selective calling equipment.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 10, 1989; Released: February 28, 1989

By the Commission:

I. INTRODUCTION

1. By a *Notice of Proposed Rule Making (NPRM)*, [1] we proposed to amend Part 80 of our Rules (Stations in the Maritime Services) (1) by revising the provisions relating to digital selective calling (DSC) equipment to conform to new International Radio Consultative Committee (CCIR) specifications and (2) by authorizing channel 70 to be used for brief digital communications relating to the condition or safety of unoccupied vessels. This *Report and Order* amends the maritime services rules substantially as proposed.

II. BACKGROUND

2. DSC is a signalling system that can be used to establish radio contact with a station or group of stations in the maritime radio services. DSC is an improvement over the traditional method of establishing ship-shore contact, which requires an operator to be on duty and to be monitoring a calling frequency for a message. When using a DSC system, message traffic can be routed selectively to a single station, a group of stations or to all stations. This capability will greatly reduce the time now required to send messages to ships at sea. Additionally, with the automatic acknowledge feature, the caller may be provided with immediate acknowledgement of receipt of the call. DSC also can provide automatically information concerning the nature of a distress situation and the location. DSC systems promote safety and efficient use of the spectrum and will eventually become part of the new Global Maritime Distress and Safety System (GMDSS) now planned for implementation in 1992.

3. In 1985, we adopted a *Report and Order* [2] that amended the maritime services rules to allow the optional use of DSC equipment. These rules were based on then-effective CCIR Recommendation 493-2, which was developed primarily for large, ocean-going ships. To enable manufacturers to design simpler, less expensive DSC equipment for smaller vessels, such as recreational craft, we specified minimum operating characteristics that would be permissible under CCIR Recommendation 493-2. Our goal was to permit the development of relatively simple, less expensive DSC equipment to perform the selective calling function while maintaining compatible characteristics for distress alerting and safety calling.

4. In 1986, CCIR revised its document entitled "Digital Selective-Calling System for use in the Maritime Mobile Service" (CCIR Recommendation 493-3, Dubrovnik, 1986). As revised, this Recommendation provides for three classes of DSC equipment. The first class pertains to large, ocean-going vessels that are required to have sophisticated radio communication capabilities for safety purposes. The second class was developed to satisfy the needs of smaller vessels that sail closer to shore and thus are not required to carry as sophisticated a radio installation as large, ocean-going vessels. The simplest version of DSC equipment specifications was developed to fill the needs of smaller boat operators for a distress alerting device.

III. PROPOSAL

5. In the NPRM in this proceeding, we proposed to remove the minimum operational characteristics from our current rules and to permit all three classes of DSC equipment to be used on U.S. vessels in conformance with revised CCIR Recommendation 493-3. The three classes of DSC equipment contained in the revised CCIR Recommendation are:

- o Class A - equipment intended for large, ocean-going ships to meet the GMDSS carriage requirements while on global voyages. This equipment has the capability of operating in the VHF, HF or MF frequency bands.
- o Class B - equipment applicable to ships on coastwise voyages equipped only with VHF and/or MF two-way communications equipment.
- o Class C - equipment intended as an add-on for VHF communications equipment to provide only DSC transmissions for alerting and ship identification purposes. It is primarily intended for ships sailing within twenty nautical miles of a shore-based distress and safety watch system.

6. We also proposed to allow the use of channel 70 the VHF DSC frequency to transmit brief digital calls relating to the condition or safety of unoccupied vessels. For example, sensors could be used to indicate the presence of an intruder, fire, explosion or other hazardous condition like grounding, listing or sinking. In the past, the use of marine frequencies for such systems on board unoccupied vessels has been precluded by Section 80.155 of our Rules, which prohibits unattended operation of ship station transmitters. Channel 70 (156.525 MHz) is now internationally dedicated for DSC distress, safety and calling. [3] Channel 70, therefore, appeared to be suitable for transmission of brief digital calls relating to the condition or safety of vessels.

7. In the *NPRM*, however, we indicated our concern about the possibility of overloading channel 70 with sensor-activated alarm messages. We noted that transmission of a VHF DSC call would take approximately 0.5 seconds and that the DSC operating procedures[4] provide that if a call is not acknowledged by the addressed coast station, the call sequence from the ship station could be repeated

after five seconds. Any subsequent repetitions of the call sequence could not be made until at least fifteen minutes had elapsed. We requested comments on whether we should permit use of channel 70 for such sensor-activated marine safety communications and, if so, whether we should impose any restrictions to reduce the possibility of overloading channel 70 in high density boating areas.

8. In addition, we proposed adding a new Section 80.179 to permit the following unattended transmitter operations:

> (a) Automatic operation of transmitters when performing:
>
> - Narrow Band-Direct Printing (NB-DP) operations in accordance with CCIR Recommendation 476 or 625.
>
> - Digital selective calling (DSC) operations in accordance with CCIR Recommendations 493 and 541.
>
> - Automated Maritime Telecommunications System (AMTS) operations or automated multi-station systems for which provisions are contained in Part 80.
>
> (b) Emergency position indicating radiobeacon (EPIRB) operations when emergency conditions preclude attendance of the EPIRB transmitter by a person.

IV. DISCUSSION

9. The only two comments in this proceeding were received from ULTMAR Limited (ULTMAR), a manufacturer of marine security equipment headquartered in the United Kingdom, and the Radio Technical Commission for Maritime Services (RTCM), a non-profit organization whose membership consists of representatives from the maritime communications industry and a number of government agencies concerned with maritime telecommunications matters. Both commenters generally supported the proposed rules and suggested minor modifications to improve the effectiveness of DSC. No reply comments were filed.

A. *DSC Specifications*

10. Both RTCM and ULTMAR generally supported the proposal to conform our rules to the revised CCIR Recommendation 493-3. RTCM, however, recommended that CCIR Recommendation 493-3 Class C DSC equipment not be authorized because there is no present or planned DSC shore-based distress and safety watch system on VHF channel 70 in the United States. Comments of RTCM at 2. RTCM noted that, in its view, it would mislead the boating public if Class C DSC equipment were introduced in the absence of facilities generally available to receive DSC distress transmissions.

11. It appears that RTCM based their views on the fact that the U.S. Coast Guard does not have any near term plans to implement a shore-based distress and safety watch on VHF channel 70. Denying the use of Class C DSC equipment, however, would preclude the boating public from using this distress alerting equipment in local areas where a distress and safety watch service could be provided by the private sector. It is possible that local boating marinas operating private coast stations and public coast stations licensees would provide a DSC distress, safety and calling service on VHF channel 70, if use of Class C DSC equipment is permitted. The fact that a shore-based distress and safety watch is not generally available is not on its own a valid reason to preclude the use of Class C DSC equipment. To take care of RTCM's concern of misleading the boating public regarding the safety features of this equipment, we are requiring manufacturers to affix a warning label to Class C DSC equipment to inform boaters that use of this equipment for distress and safety purposes is dependent upon close (approximately 20 nautical miles) geographic proximity to a shore-based VHF channel 70 distress and safety service. Accordingly, we are amending Section 80.225, 47 C.F.R. § 80.225, to remove the DSC minimum operational characteristics and to authorize the optional use of CCIR Class A, Class B, and Class C DSC equipment substantially as proposed.

B. *Alarm System*

12. Both RTCM and ULTMAR provided comments concerning the proposed shipboard sensor-activated VHF alarm system for unattended vessels using DSC technology (alarm system). RTCM emphasized that sensor-activated alarm systems should be structured so as to be compatible with CCIR Recommendations 493-3 and 541-2 and with marine communications in general. RTCM suggested that sensor-activated alarm systems be standardized so that ships employing these systems would do so with a minimum of disruption to the principal services for which channel 70 has been allocated. We share the concerns of RTCM on this matter and have sought to develop rules consistent with the overall DSC system and marine communications in general.[5]

13. ULTMAR believed the proposed sensor-activated transmission would be limited to a half second duration with only one repeat. Comments of ULTMAR at 1. ULTMAR noted that there might be times when such a transmission is missed by the receiving station because of either background noise or illegal transmissions. ULTMAR proposed that a coast station be authorized to interrogate the ship and provide the coast station's unique call sign. Upon receipt of the station's call sign, the interrogated ship would reply giving the status of its various sensors. ULTMAR did not propose a means for accomplishing this interrogation in a manner consistent with CCIR Recommendation 493-3.

14. CCIR Recommendation 541-2 permits a DSC transmission to be repeated once after five seconds and thereafter only after an interval of fifteen minutes.[6] In addition, CCIR recommends "monitoring the VHF channel used for digital selective calling purposes to determine the presence of a signal and, except for distress and safety calls, providing facilities for automatically preventing the transmission of a DSC call until the channel is free . . . ."[7] CCIR Recommendations 541-2 provides both for multiple repeats of DSC transmissions and for automatic inhibitions of such transmissions whenever there is a call on channel 70. Additionally, the use of telecommand polling, consistent with the provisions of CCIR Recommendation 493-3, is available and could be useful to obtain information concerning the operable status of DSC circuitry. CCIR Recommendation 493-3 does not provide for the interrogation feature requested by ULTMAR. For these reasons, we have not made provision in our rules to permit coast stations to interrogate the various sensors on board moored vessels.

15. ULTMAR also suggested that the conditions under which sensor-activated alarm transmissions are authorized be expanded to include low battery power or failure of the generator system. Comments of ULTMAR at 1. Since there are many scenarios that could relate the availability of battery power to ship safety, we agree that a sensor-activated alarm for this purpose could be useful. In order to be compatible with CCIR Recommendation 493-3, and permit sensor-activation in the case of intrusion, low-battery power and other circumstances related to ship safety, we are removing the "intrusion" condition from the proposed list of conditions under which sensors must automatically activate the transmitter and replacing it with a new condition entitled "undesignated condition related to ship safety." This new condition will provide user flexibility while remaining consistent with the format provided by Recommendation 493-3.

16. RTCM recommended that reference should be to vessels "while moored" rather than to "unoccupied" vessels. Comments of RTCM at 2. RTCM argues that use of the term "while moored" does not preclude vessels that have people on board. For example, many people sleep on board vessels in a marina. We concur with RTCM and have used the term "while moored" in lieu of "unoccupied."

17. In the DSC system, the "category" of the call defines the priority the system gives the call sequence. RTCM suggested that sensor-activated alarm system equipment only employ the ROUTINE category. Comments of RTCM at 3. The ROUTINE category has a lower priority than the DISTRESS, URGENCY and VITAL SAFETY categories. RTCM reasoned that use of the ROUTINE category would avoid potential conflicts between the alarm system and high priority DSC safety messages. It noted that when operators are present they have the opportunity to employ the vessel's regular VHF radio installation with use of appropriate priority to initiate a higher priority call. We concur with RTCM and have incorporated its proposal into our Rules.

18. RTCM responded to our invitation to comment concerning potential overload of channel 70 in high density boating areas due to sensor-activated alarm messages. While conceding that it currently is not possible to forecast the growth rate for DSC use of channel 70, RTCM suggested that it would be prudent to place reasonable restrictions on the repetition of alarm system transmissions activated by sensors and to require the automatic blocking of such transmissions whenever there is a call in progress on channel 70. RTCM Comments at 3. RTCM considered the restrictions contained in CCIR Recommendation 541-2 to be reasonable. In addition, RTCM proposed that the output power for sensor-activated alarm systems be limited to one watt. Comments of RTCM at 3. We concur with RTCM concerning prudent restraints to avoid channel congestion and have incorporated its proposals into our Rules. As an added safeguard, we have limited the number of repetitions of sensor-activated DSC transmissions after fifteen minute waiting periods to no more than three.

19. Further, RTCM recommended that the alarm transmissions employ a fixed format system in conformity with CCIR Recommendation 493-3. Comments of RTCM at 4. RTCM noted that the proposed inclusion of a programmed telephone number in the DSC alarm sequence offers no useful capability that could not be incorporated readily into coast station equipment in the event that notification for another party is desired. We concur with RTCM that it serves no useful purpose to include a programmed telephone number in the alarm sequence. Any telephone numbers, special instructions, or the like, can be incorporated in the coast station's equipment or procedure and avoid the need to transmit such information. Additionally, use of information such as a telephone number in the alarm sequence would deviate from the provisions of CCIR Recommendation 493-3. Accordingly, we have added RTCM's proposed DSC sequence into our Rules and have deleted the provision permitting the capability to call a pre-programmed telephone number.

20. We have reviewed our original proposal concerning the conditions under which sensors would be allowed to activate a ship transmitter automatically. Among other things, the intent of this proposal was to permit a received Emergency Position Indicating Radiobeacon (EPIRB) signal to automatically activate the transmitter indicating that an EPIRB had been activated.[8] Because the latter transmitter activation would be redundant, channel 70 DSC EPIRB equipment is not available and ultimately may not be authorized for use on board U.S. ships, we have removed the "EPIRB emission" from the list of authorized conditions.

V. CONCLUSION

21. In summary, these new rules provide for DSC equipment characteristics in conformity with the International Radio Regulations and CCIR Recommendations. Further, the new rules permit certain unattended transmitter operations and provide for the use of a shipboard sensor-activated VHF alarm system for moored vessels using DSC technology. The text of the new rules is contained in the Appendix to this Order.

22. The Commission hereby certifies pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) that this Rule Making proceeding will not have a significant economic impact on a substantial number of small entities. The new rules replace the minimum operational characteristics contained in our current Rules. No U.S. manufacturer is known to be manufacturing DSC equipment under the rules proposed to be deleted in this proceeding. No new equipment carriage requirements are imposed.

23. The Rule amendments adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public. *See* 5 C.F.R. § 1320.7(c)(2).

VI. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Part 80 of our Rules IS AMENDED as set forth in the Appendix below effective **April 14, 1989.** The authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

25. IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

26. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. 151 - 155, 301 - 609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.153 is amended by revising paragraph (a) to read as follows:

§ 80. 153 Coast station operator requirements.

(a) Except as provided in § 80.179, operation of a coast station transmitter must be performed by a person holding a commercial radio operator license of the required class, who is on duty at the control point of the station. The operator is responsible for the proper operation of the station.

* * * * *

3. Section 80.155 is revised to read as follows:

§ 80. 155 Ship station operator requirements.

Except as provided in §§ 80.177 and 80.179, operation of transmitters of any ship station must be performed by a person holding a commercial radio operator license or permit of the class required below. The operator is responsible for the proper operation of the station.

4. A new § 80.179 is added to read as follows:

§ 80. 179 Unattended operation.

The following unattended transmitter operations are authorized:

(a) EPIRB operations when emergency conditions preclude attendance of the EPIRB transmitter by a person.

(b) Automatic use of a transmitter during narrow band-direct printing (NB-DP) operations in accordance with CCIR Recommendation 476 or 625.

(c) Automatic use of a transmitter during digital selective calling (DSC) operations in accordance with CCIR Recommendations 493 and 541.

(d) Automatic use of transmitter when operating as part of the Automated Maritime Telecommunications System (AMTS) or an automated multi-station system for which provisions are contained in this Part.

(e) Automatic use of a VHF transmitter to send brief digital communications relating to the condition or safety of vessels while moored when all of the following conditions are met:

(1) The equipment must be using DSC in accordance with CCIR Recommendations 493 and 541 as modified by this section.

(2) Sensors must automatically activate the transmitter only under one or more of the following conditions:

(i) Fire, explosion;

(ii) Flooding;

(iii) Collision;

(iv) Grounding;

(v) Listing, in danger of capsizing;

(vi) Sinking;

(vii) Disabled and adrift; and

(viii) Undesignated condition related to ship safety.

(3) The "ROUTINE" DSC category must be used.

(4) Communications must be selectively addressed to an individual station.

(5) Transmitter output power must not exceed one watt.

(6) The call must employ a fixed format and must be in conformity with Recommendation 493 as follows:

Format specifier: Individual call - symbol 120 sent twice.

Address: 9 digit maritime mobile service identity of called station.

Category: Routine - symbol 100.

Self-identification: 9 digit ship station identity.

Message 1: Telecommand symbol 126 sent twice.

Message 2: Telecommand symbol 126 sent 6 times.

End of sequence: Symbol 127.

Error-check character: Check sum.

(7) Such transmissions are permitted only on channel 70 and the transmitter must be inhibited automatically whenever there is another call in progress on Channel 70.

(8) The call sequence for any one alarm must not be repeated until after an interval of at least five seconds. Further repetition is permitted only after intervals of at least fifteen minutes each. Repetitions following fifteen-minute waiting intervals must not exceed three.

5. Section 80.225 is revised to read as follows:

§ 80. 225 Requirements for digital selective calling (DSC) equipment.

This section specifies the requirements for optional DSC equipment installed in ship and coast stations. Reference to any CCIR Recommendation in this section is to the most recent CCIR approved Recommendation that does not prevent the use of existing equipment.

(a) DSC equipment installed in coast and ship stations must be designed in accordance with CCIR Recommendation 493. Class A, B, and Class C DSC equipment must not be used with the sensors referred to in § 80.179(e)(2).

(b) Manufacturers of Class C DSC equipment to be used on United States vessels must affix a clearly discernible permanent plate or label visible from the operating controls containing the following:

> "Warning. This equipment is designed to generate a digital maritime distress and safety signal to facilitate search and rescue. To be effective as a safety device, this equipment must be used only within communication range of a shore-based VHF marine channel 70 distress and safety watch system. The range of the signal may vary but under normal conditions should be approximately 20 nautical miles."

(c) Selective calling equipment, other than that designed in accordance with CCIR Recommendation 493, is authorized as follows:

(i) Equipment used in conjunction with the Automated Maritime Telecommunications System (AMTS) in the band 216-220 MHz,

(ii) Equipment used to perform a selective calling function during narrow-band direct-printing (NB-DP) operations in accordance with CCIR Recommendation 476 or 625, and

(iii) Equipment functioning under the provisions of § 80.207(a) until at least three years after mandatory DSC requirements become effective.

FOOTNOTES

[1] 2 FCC Rcd 6854 (1987).

[2] Report and Order, PR Docket No. 83-431, 50 Fed. Reg. 33942.

[3] *See* Resolution 323 (formerly COM4/2), Final Acts of the World Administrative Radio Conference for the Mobile Services (MOB-87), Geneva, 1987.

[4] CCIR Recommendation 541-2, "Operational Procedures for the Use of Digital Selective-Calling (DSC) Equipment in the Maritime Mobile Service" (1986).

[5] The absence of a nation-wide DSC shore-based distress and safety watch system on VHF channel 70 is not relevant to implementation of local area sensor-activated alarm systems for DSC safety transmissions.

[6] *Id.* at Annex II, § 2.2.5.

[7] *Id.* at 3.7 (unanimous recommendations).

[8] Emergency Position Indicating Radiobeacon (EPIRB) equipment is used by ships in distress to transmit signals intended to facilitate search and rescue operations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-154

In Re

Reexamination of the Commission's
Cross-Interest Policy

FURTHER NOTICE OF INQUIRY/NOTICE OF PROPOSED RULE MAKING

Adopted: October 27, 1988; Released: February 28, 1989

By the Commission:

INTRODUCTION

1. On June 5, 1987, we issued a *Notice of Inquiry* (*Notice*) to determine the continued necessity of our cross-interest policy.[1] As a result of our comprehensive review, we have today concluded that the scope and applicability of the policy should be reduced and we have abolished the cross-interest policy as it applied to consulting positions, time brokerage agreements, and advertising agencies.[2]

2. As indicated in our initial *Notice* and in the above referenced *Policy Statement*, the policy in question reflects certain concerns that are prohibited by neither Commission rules nor other policies but which have, on occasion, been thought to warrant further review in the application process. The types of matters remaining within the cross-interest policy are those where there is a potential intertwining of the interests of stations through common employees, common participation in other business ventures, or ownership interests short of those involving common control or even significant influence and which are, therefore, not considered "attributable" for other purposes such as the ownership rules. Our purpose in issuing this *Further Notice* is to obtain further comment on the question of whether "key" employee relationships should be included within the rules and to obtain further comment on whether sufficient concerns remain in the area of joint ventures and nonattributable ownership interests that these should be matters subject to further review under a continued cross-interest policy. If so, we seek comment on a better statement of principles to govern such *ad hoc* review as would continue to take place.[3]

KEY EMPLOYEES

3. *Background*. In the original *Notice*, we inquired whether it was in the public interest routinely to permit cross-interests involving key employees,[4] *e.g.*, a key employee of one broadcast station serves as a key employee or has an attributable and/or controlling interest in another station in the same community or market. The theory underlying application of the policy, we stated, is that there is a potential for impairment of competition stemming from an apparent conflict of interest and the ability of a key employee to implement policy to protect his ownership stake in the other station.[5] In a similar vein, we pointed out that persons holding "key" programming positions could affect diversity of program or service viewpoints.[6] We asked whether key employee relationships create such concerns and requested commenters to identify and define the employment positions, if any, which create these concerns and the limits to which they should be subject.[7] As a final matter, we requested commenters to address external factors, if any, which should be considered, such as market size, in deciding whether to proscribe such interests.[8]

4. In response to our *Notice*, several parties focused attention on the key employee aspect of the policy. The National Association of Broadcasters (NAB) maintains in its comments that the effects of such employees on diversity are not as significant as they may appear due to the large number of outlets in the marketplace. Similarly, Cox Enterprises, Inc. (Cox) argues that the highly competitive nature of the marketplace will diminish the likelihood of abuse because competitors will detect such behavior. It further maintains that audience reaction will serve as a deterrent if a station fails to program in the audience's interest. Of greater importance, according to Cox, is the fact that licensees realize it is not in their self interest to permit key employees to have relationships with other stations in the same market. Cox maintains that, to guard against this danger, stations develop internal conflict of interest policies which result in better protection against abuses than could Commission rules. Such policies, Cox explains, typically prohibit key employees from having any connection with other media in the market; some even go so far as to prohibit all other media interests.

5. The Consumer Federation of America and Telecommunications Research and Action Center (CFA/TRAC), filing jointly, expressed concern about key employees because knowledge acquired by key employees about station operations might foster the sharing of information and result in predatory practices, thus directly affecting diversity through a reduction in program options. London Bridge Broadcasting, Inc. states that management is akin to ownership and, therefore, should be treated similarly.

6. *Discussion*. As noted above, we have already determined that the several relationships addressed by the cross-interest policy no longer create concern sufficient to warrant regulation. However, key employee relationships may be different than the other types of cross-interests due to the role key employees play in a station's operations. Accordingly, because the potential for negative effects on competition and viewpoint diversity may be greater in key employee relationships than in other cross-interests, we believe it would be helpful to have further comment specifically focusing on key employee cross-interests. If we decide at the conclusion of this proceeding that key employee cross-interests should continue to be regulated, our preference would be to amend the attribution provisions of our ownership rules rather than to continue proceeding on an *ad hoc* adjudicatory basis without benefit of guidelines. Accordingly, we invite comment on this issue.

7. Without calling into question the propriety of continuing to subject officers and directors to the multiple ownership rules, we wish to explore whether there are

similarities between key employees and officers and directors in terms of the degree of control they exercise and, if so, whether these similarities justify, as a matter of policy, the need to treat them in a like manner. Our present attribution rules do not permit a single individual to serve as an officer at two stations in the same market.[9] It may also be antithetical to those rules to permit a person to have an attributable interest in one station and to manage a competing station if the position allows that person to exercise a similar, or greater, degree of influence over programming decisions and/or policy decisions regarding the management, operation or overall direction of the station. Accordingly, we believe it is essential for commenters to address the question whether, for our regulatory purposes, key employees are distinguishable from officers and directors and, if so, in what ways. We also request comment on the question of what criteria, if any, should be used to determine if a position entails a level of control which must be prohibited.

8. There may also exist a system of non-regulatory safeguards that would protect against the possibility of a key employee sacrificing the welfare of his employer-licensee in order to protect his ownership stake in a competing media outlet. For example, the relative ease with which an employee can be discharged may be sufficient to dissuade a general manager from making decisions designed to protect an attributable interest. It also may be unlikely, however, as suggested by Cox in its comments, that a station would hire someone for a key employee position if that person also held a cognizable interest in a competing licensee.

9. Assuming, however, that the prospects for these types of relationships are not so remote, we request commenters to discuss whether mechanisms exist that would deter key employees from engaging in prohibited conduct, even if they were able to exert considerable influence over station policy, management, and operation. We concluded, in our *Policy Statement*, that alternative mechanisms exist to deter many cross-interest abuses and, in the event of abuse, to remedy the offense without the need for regulatory intervention.[10] We therefore invite comment on whether the original concerns underlying key employee relationships may be addressed sufficiently by the types of marketplace mechanisms (*e.g.*, competitive market forces, contractual agreements) and alternative remedies (*e.g.*, existence of private remedies) that led to our decision to abolish the restriction on certain other cross-interests. We seek comment on whether the availability of such measures would be an adequate incentive and thus diminish or vitiate the need for specific regulations in this area. For example, the internal conflict of interest policies mentioned by Cox may diminish concerns about key employees, but the question remains whether such concerns are sufficiently diminished to preclude the need for continued regulation in order to protect the public interest. Finally, we invite comment on whether, notwithstanding any concerns raised, the public interest benefits derived by permitting marginal stations to resolve financial or programming difficulties through the use of experienced employees would be sufficient on balance to justify permitting such cross-interests.

NONATTRIBUTABLE EQUITY INTERESTS

10. *Background*. Our original *Notice* also questioned the continued necessity of limiting nonattributable equity interests through the cross-interest policy. That aspect of our policy generally involves an individual who has an attributable or controlling interest in one station and a substantial equity interest in another station in the same market that is not attributable under our ownership rules. Such interests may include, but are not limited to, nonvoting stock, limited partnership interests and minority stock interests in a corporation having a single majority stockholder.[11] The concern with these cross-interests is that the individual could use his controlling interest in one station to protect his substantial financial stake in the other station, thus, impairing arm's length competition. To determine when a nonattributable equity interest is sufficiently meaningful to warrant regulatory concern or possible intervention, the Commission currently uses a case-by-case approach. Past cases decided under this *ad hoc* review afford some general guidance in this area but make difficult a determination by interested parties of how, if at all, the policy will be applied in a specific situation. Accordingly, in the *Notice*, we inquired whether nonattributable equity interests continue to require regulatory review and whether the *ad hoc* nature of the policy inhibits otherwise permissible transactions that may inure to the benefit of the public.

11. In response to the original *Notice*, little record evidence was received regarding whether nonattributable equity interests should continue to be subject to the cross-interest policy. Only Morgan Stanley & Co., Inc. (Morgan Stanley) specifically addressed that aspect of the cross-interest policy which applies to nonattributable equity interests. It favors elimination of the policy because the *ad hoc* nature results in a lack of certainty regarding what interests are permitted. This uncertainty impairs the ability of broadcasters to attract equity investment capital through the use of nonattributable equity interests because the policy can be invoked to prohibit a seemingly permissible transaction. Thus, Morgan Stanley asserts, the cross-interest policy inhibits investors from providing capital through nonattributable equity interests because the relationship may ultimately be barred by the policy. As Morgan Stanley notes, insofar as the policy discourages the use of noncontrolling equity investment, it is at variance with the Commission's endorsement of this type of investment as a valuable means of raising capital while avoiding a dilution of control. Therefore, Morgan Stanley asserts, elimination of the cross-interest policy would be more in accord with Commission precedent and would benefit the public.

12. *Discussion*. We have decided to develop a more complete record on this issue before determining whether to repeal this aspect of the cross-interest policy. On the one hand, it could be argued that nonattributable equity interests may, in certain circumstances, engender concerns about arms length competition and diversity in certain markets in which the interest holder also has an attributable interest in another outlet. It is possible that the attributable interest may be used to take action which would benefit or protect the nonattributable investment in a competing station thus lessening economic competition.[12] On the other hand, we question whether such an anticompetitive result is probable and whether such concerns are addressed by the same marketplace constraints (*e.g.*, contractual agreements or fiduciary duties) which

contributed to our decision to eliminate the limitation on other cross-interests. Moreover, in the attribution proceeding, the Commission indicated that these interests did not create a sufficient level of concern to require inclusion in the attribution provisions of the ownership rules.[13] Thus, commenters should address whether nonattributable equity interests confer a level of control or create concerns sufficient to require some regulatory limitation and should provide, if possible, data, studies, and other evidence in support of their positions.

13. We emphasize, however, that by instituting this proceeding we do not intend to reopen the attribution proceeding, which concluded in 1986, or to revise the attribution rules to incorporate currently nonattributable equity interests. Rather, if we conclude that we must, in some fashion, continue to take cognizance of nonattributable equity interests we would simply continue our *ad hoc* review of such issues by retaining a substantially narrowed cross-interest policy to address any diversity or competition concerns that may arise as the result of such interests. In the event that commenters deem some form of continued case-by-case review to be appropriate, we invite them to identify, at least in general terms, particular categories of nonattributable interests requiring continued oversight. In addition, commenters should address whether such review should be confined to particular geographic markets, *i.e.* those with a certain number of media outlets. To the greatest extent possible, we seek to develop clear principles to govern any *ad hoc* review found necessary at the conclusion of this proceeding.

JOINT VENTURES

14. *Background*. We also seek further comment on the need to continue to review licensees' involvement in certain broadcast joint ventures through our cross-interest policy. Although the Commission has never explicitly defined joint ventures that fall within the ambit of the policy, they typically involve an association of two or more parties to carry out a business enterprise for profit.[14] This type of relationship was first addressed by the Commission in a case where owners of two radio stations in the same market sought to build a new television station in that market, with each radio station owner having a fifty percent stock interest in the proposed television joint venture. There, the Commission denied the television application based on the belief that successful operation of the television station would require the owners of the two competing radio stations to work in concert and thereby increase the potential for collusion, thus, creating a adverse impact on competition in the market.[15] Today the cross-interest policy would not be necessary to address factual situations of this type because they are addressed directly by our ownership rules. Each radio station's 50% equity interest in the UHF television station in *Macon* would trigger the Commission's rule governing the common ownership of a commercial radio station and a commercial television station in the same market.[16] The local ownership rules, however, do not preclude radio stations that operate in the same service in the same market from engaging in a joint venture to build or buy a radio station in another service in that market. For example, three AM stations may join together to build or buy an FM station without running afoul of the local ownership rules because the one-to-a-market rule permits a party to hold cognizable interests in AM-FM combinations.[17] Ventures of this sort are still, however, addressed by the cross-interest policy. In the *Notice*, we questioned whether these types of joint ventures continue to require Commission oversight or whether the intervening revisions to the Commission's ownership attribution rules reduces the necessity to restrict joint ventures.

15. In response to our *Notice* we received few comments directly addressing the joint venture aspect of the cross-interest policy. Commenters favoring repeal of the cross-interest policy only asserted generally that our multiple ownership rules are sufficient to limit any venture which may have a negative effect on the public interest. CFA/TRAC, however, argued that the Commission is intent on repealing certain aspects of the ownership rules and, thus, joint ventures currently addressed by the rules will be ultimately prohibited by neither the policy nor the rules, despite the Commission's assertion to the contrary. CFA/TRAC concludes that retention of the policy in a clarified form is, therefore, required to protect the public interest.

16. *Discussion*. We have decided that before determining the proper regulatory treatment to be accorded joint ventures, it is necessary to develop further the record on this issue. Although some commenters assert that our ownership rules have already supplanted the cross-interest policy as it applies to joint ventures, this is not always the case.[18] Our local ownership rules do not explicitly preclude radio stations that operate in the same service in the same market from engaging in a joint venture to build or buy a radio station in another service in that market.[19] Rather, such relationships have been examined under the cross-interest policy. It might be argued, on the one hand, that arms-length competition may be reduced as a result of the close business relationship between the stations engaged in the venture. For example, two stations which combine to form a third may be tempted to share business information or enter into agreements regarding programming or advertising rates which may diminish the level of competition in the market. One may question whether it is realistic to expect the stations' management to compartmentalize their actions so that their focus is on operating the new station rather then reducing the competitive climate in the market.

17. On the other hand, it may equally be argued that the competitive nature of local media markets eliminates any benefits which may result from anticompetitive behavior by the participants in a joint venture. In a market with many stations, even if two stations attempted to collude through a joint venture, we question whether there would be a substantial decrease in the overall level of competition among broadcast stations in the market. The risk of adverse effects may be sufficiently small that continued oversight of joint ventures is unjustified. If the possibility of anticompetitive behavior still exists, it may be more appropriate, as with the cross-interests we are permitting today, to rely on federal and state antitrust laws to prevent or remedy any abuses of joint venture relationships. Thus, we invite comment on whether the growth of the media marketplace, in conjunction with alternative deterrents and remedies, is sufficient to reduce our concern that joint ventures will adversely affect the level of competition in a market. Finally, eliminating this aspect of the cross-interest policy so as routinely to permit joint ventures of this sort, may result in a number of public interest benefits, for example, activation of an un-

used channel or improvement of the financial base and overall service of individually struggling stations. We believe it is important to examine further whether these or any other benefits outweigh the negative effect joint ventures are thought to have on local media competition. Accordingly, we seek comment upon whether, taking into account the above considerations, it is necessary to continue to review of joint ventures under the cross-interest policy.[20] Those who favor continued review should address whether such oversight should occur in all cases or should be limited, *i.e.* to geographic markets with comparatively few outlets.

CONCLUSION

18. While in the *Policy Statement* we are issuing today in this docket we remove a number of relationships from the purview of the cross-interest policy, we seek to develop a fuller record concerning joint ventures, key employees, and certain nonattributable equity interests before we reach a final conclusion regarding these areas. Accordingly, we seek comment on the issues raised herein and the course of action we should follow to resolve them. Commenters are encouraged to submit any data, studies, accounts of specific experiences, and any other information they deem pertinent to the issues here under review.

ADMINISTRATIVE MATTERS

19. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203.

20. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without the advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide, on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **April 21, 1989,** and reply comments on or before **May 8, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*.

22. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *NOI/NPRM*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *NOI/NPRM*, including the initial regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164.5 U.S.C. Section 601 *et seq.* (1981)).

23. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

24. Authority for this proposed rule making is contained in Sections 1, 3, 4 (i) and (j), 303, 308, 309 and 403 of the Communications Act of 1934, as amended.

25. For further information on this proceeding, contact Douglas J. Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action:

This *Notice of Inquiry / Notice of Proposed Rule Making* (*NOI/NPRM*) is issued to seek further comment on whether key employees exercise a level of control such that these positions should be treated as attributable interests under the Commission's multiple ownership rules, and for the continued need for limiting certain nonattributable equity interests and joint ventures through the cross-interest policy. With the exception of key employees, certain nonattributable equity interests and joint ventures, we have determined that it is in the public interest to eliminate the cross-interest policy as it applies to the bulk of the relationships previously within its purview. We recognize, however, that key employees may be viewed as creating concerns similar to those presented by officers and directors in terms of the control they exercise over station operations and that nonattributable equity interests also may engender significant levels of influence or control. Comment is also sought regarding certain types of joint ventures engaged in broadcast licensees. Our uncertainty over the level of influence of these relationships causes us to seek further comment on the question whether elimination of the cross-interest policy in this area would serve the public interest.

II. Objective:

This *NOI/NPRM* is intended to determine the necessity of continued regulation of key employee relationships, certain nonattributable equity interests and joint ventures. By this proceeding the Commission will develop a record on which to determine the need for retaining this portion of the cross-interest policy through incorporation of key employees as attributable interests in our multiple ownership rules or retention of the policy as it applies to designated nonattributable equity interests and joint ventures.

III. Legal Basis:

Authority for the Commission's engaging in rule making may be found in Sections 4(i) and (j) and 303(r) of the Communications Act of 1934, as amended.

IV. Description, Potential Impact, and Number of Small Entities Affected:

This *NOI / NPRM* seeks comment on the role key employees play in the promotion of diversity and arms-length competition in a market. It also seeks comment on whether key employee relationships should be treated as attributable interests under the ownership rules and whether any external factors should effect that determination. This *NOI/NPRM* seeks comment on whether alternative mechanisms, such as market incentives or licensee's internal policies, are sufficient deterents to possible abuses of these positions. This *NOI/NPRM* questions whether incorporating key employees will result in a burden on the public interest by denying the station the ability to utilize experienced personnel.

Prohibition of key employee relationships would prohibit the employment of experts who have attributable interests at another media outlet in the same market. Thus, small entities would not be permitted to take advantage of a person who is knowledgeable about that market and might be able to assist the station in its programming or improve its competitive position in the market. However, if key employees exercise a level of control which makes anticompetitive conduct a possibility, incorporation of such positions in the local ownership rules will likely prevent such abuses.

In our original *Notice*, we questioned the continued necessity of limiting certain nonattributable equity interests through the cross-interest policy. Specifically, we asked whether nonattributable equity interests continue to require regulatory restrictions and whether the *ad hoc* nature of the policy inhibits otherwise permissible transactions that may inure to the benefit of the public. We also questioned whether certain joint venture arrangements are addressed by the local ownership rules so that continued oversight under the cross-interest policy is no longer required. The Commission received little comment in response to these questions. Thus, we have decided to develop a more complete record on these issues before determining whether to repeal these aspects of the cross-interest policy.

This *NOI/NPRM*, therefore, seeks comment on whether marketplace forces or alternative Commission rules and policies serve the same function as the key employee provision of the cross-interest policy. It also solicits comment on which employees, if any, should be covered if a rule is found necessary. Finally, the *NOI/NPRM* seeks comment on whether the cross-interest policy must be retained as it applies to certain nonattributable equity interests and joint ventures. Through the information received in the comments, the Commission hopes to relieve the burden placed on licensees by these provisions of the cross-interest policy, while protecting the public interest. There are approximately 8,892 commercial radio stations, and 1,006 commercial television stations, as well as 8,000 cable television systems, and 1,671 newspapers which could be affected by the decision adopted in this matter.

V. Recording, Record Keeping, and Other Compliance Requirements:

None.

VI. Federal rules which overlap, duplicate, or conflict with this rule:

This *NOI/NPRM* is intended to ascertain whether key employees and certain nonattributable equity interests and joint ventures are beyond the scope of the local ownership rules because of their minimal impact or whether they create sufficient concern warranting inclusion in the Commission's rules or, in the case of certain nonattributable equity interests and joint ventures, retention of the cross-interest policy.

VII. Any significant alternative minimizing impact on small entities and consistent with the stated objective:

None.

FOOTNOTES

[1] *See Reexamination of the Commission's Cross - Interest Policy*, 2 FCC Rcd 3699, 3702 (1987) (*Notice of Inquiry* in MM Docket No. 87-154). The cross-interest policy essentially prevents individuals or entities from having "meaningful" cross-interests in two broadcast stations, or a daily newspaper and a broadcast station, or a cable television and a television broadcast station serving substantially the same area.

[2] *See Reexamination of the Commission's Cross - Interest Policy*, _____ FCC Rcd _____ (1988) (*Policy Statement* in MM Docket No. 87-154) [hereinafter *Policy Statement*].

[3] The comments and reply comments that were filed in response to the original inquiry in this proceeding that address these issues will be incorporated herein.

[4] As described in the *Notice*, *supra* at 3699, we have defined key employees as those who hold positions of authority to implement programming decisions, sales practices, or station operations, *e.g.*, general managers, station managers and program directors. *See also Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-82 (1970) (cross-interest policy issue added where two shareholders of an applicant for a new AM station were general manager and sales manager of two other AM stations with significant overlap of the 1 mVm contours); *United Community Enterprises, Inc.*, 37 FCC 2d 953 (1972). Unlike other key employees, chief engineers generally do not make decisions regarding the policy, programming, or business planning of a licensee. For that reason, cross-interests involving the chief engineer pose little risk to diversity or competition. Thus, if we decide at the conclusion of this proceeding to add key employees to the attribution provisions of the ownership rules, we do not contemplate including chief engineers in that category.

[5] *Notice*, *at 3699*.

[6] *Id.*

[7] *Id.* at 3702.

[8] *Id.*

[9] 47 C.F.R. § 73.3555, Note 2(h) (1986).

[10] In that proceeding, we determined that market pressure creates incentives for service providers to compete vigorously. Thus, the large number of competing media outlets cause a station to be acutely aware of its audience's needs and desires or risk losing that audience to a competitor. *Policy Statement*, paras. 21-25. We further concluded that federal and state antitrust laws, as well as actions for breach of contract, are sufficient to address most instances of anticompetitive conduct. *Id.* at paras. 34-35.

[11] For example, if the licensee of a new television station is comprised of a single majority stockholder of 52%, and one radio station in the market holds a 48% interest the radio station's interest is nonattributable for purposes of the ownership rules.

[12] We emphasize that this aspect of the instant *Notice* is limited to substantial nonattributable equity interests, *i.e.* those that would arguably be likely to induce the holder of an attributable interest to take actions to protect the nonattributable investment. Thus, for example, ownership interests that are nonattributable because they are below the relevant attribution benchmarks [47 C.F.R. § 73.3555 Note 2(a)] are outside the scope of this proceeding. Such *de minimis* interests are not sufficiently likely to induce anticompetitive conduct to warrant the costs engendered by our continued scrutiny.

[13] *See Attribution of Ownership Interests*, 97 FCC 2d 997 (1984) (*Report and Order*), *recon. granted in part and denied in part*, 58 RR 2d 604 (1985), *further recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). This proceeding modified the attribution rules to exempt from their scope holders of less than five percent of the voting stock of the licensee and limited partners who certify that they are not materially involved in the management or operation of the licensee. Additionally, relief from attribution was provided certain officers and directors whose duties are unrelated to broadcast operations. The Commission's rules also exempt from attributable interest minority voting stock interests if there is a single shareholder of more than 50 percent, passive investor interests under ten percent, and holders of nonvoting stock. 47 C.F.R. § 73.3555, Note 2(b), (c), and (f) (1986).

[14] 48 C.J.S. *Joint Ventures* § 2.

[15] *Macon Television Co.*, 8 RR 703, 704-705 (1952).

[16] *See* 47 C.F.R. § 73.3555(b) (1987).

[17] *See* 47 C.F.R. § 73.3555(b).

[18] Commenters are correct in some respects. For example, a joint venture between two AM stations to create a third AM station in the same market would be prohibited by the duopoly rule which limits ownership of intraservice combinations. 47 C.F.R. ¶ 73.3555(b).

[19] For example, three AM stations may join together to build or buy an FM station withou triggering the one-to-a-market rule because that rule permits a party to hold cognizable interests in AM-FM combinations. *See* 47 C.F.R. ¶ 73.3555(b).

[20] During the pendency of this proceeding, such cases will continue to be reviewed.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
CC Docket No. 80-286

In the Matter of:

Amendment of Part 69 of the
Commission's Rules Relating to
the Assessment of Charges for
the Universal Service Fund and
Lifeline Assistance

NOTICE OF PROPOSED RULE MAKING

Adopted: November 7, 1988; Released: November 9, 1988

By the Commission:

I. INTRODUCTION

1. As part of the non-traffic-sensitive (NTS) cost recovery plan proposed by the Federal/State Joint Board in CC Docket Nos. 78-72 and 80-286 (Joint Board), this Commission has developed a program designed to assist high-cost local exchange carriers (LECs), known as the Universal Service Fund (USF), and two federal lifeline assistance programs designed to assist low-income households in obtaining and affording telephone service, known as the Link Up America and subscriber line charge (SLC) waiver programs.[1] Under the rules proposed by the Joint Board and adopted by this Commission, starting on April 1, 1989, all of these programs will be funded by a charge assessed on interexchange carriers (IXCs) in proportion to their number of presubscribed lines.[2] Thus, pursuant to Sections 69.116 and 69.117 of our rules, a per-line charge will be assessed on all IXCs that have at least one percent of all presubscribed lines on a nationwide basis, or at least five percent of the presubscribed lines in any one study area and a minimum of one thousand presubscribed lines in that study area. [3] This charge is to be computed and assessed by the National Exchange Carrier Association (NECA) based on data submitted to NECA by the LECs.

2. The preliminary presubscribed lines data collected to date by NECA indicate that the existing presubscribed lines criteria may yield unexpected and anomalous results in the selection of the IXCs that are assessed the charge for the USF and lifeline programs. NECA reports that an analysis of presubscribed lines data that is currently available indicates that our present rules would result in some very small IXCs being billed for USF and lifeline assistance, while other medium-sized IXCs would not be billed.

3. This result does not appear to be consistent with the expectations of the Joint Board or this Commission in formulating the USF and lifeline assistance funding programs. We accordingly propose to change the criteria governing which IXCs will be assessed these charges by providing that only IXCs with more than .05 percent of the nationwide presubscribed lines will be required to pay the per-line charge to fund the USF and lifeline assistance programs.

II. BACKGROUND

4. On March 31, 1987, the Joint Board released a *Recommended Decision* which recommended further action relating to the recovery of NTS costs, including modest SLC increases, an expansion of federal lifeline assistance, a retargeting of the high-cost assistance fund, and a restructuring of the existing common line tariff and pooling system.[4] This Commission adopted the Joint Board's conclusions and integrated recommendations in our May 19, 1987, *NTS Recovery Order*, with certain minor modifications in the proposed implementation schedule for the SLC increases.[5] In our recent *NTS Recovery Reconsideration Order*, we affirmed the overall approach adopted in the *NTS Recovery Order*, but made several technical modifications to our requirements in response to various petitions for reconsideration.[6]

5. The approach developed by the Joint Board and adopted by this Commission endorsed the existing SLC waiver lifeline assistance program, which exempted qualifying subscribers from subscriber line charges when matching state benefits are provided pursuant to a certified state plan, and further provided that the federal benefits should be increased to correspond with the SLC increases. In addition, the SLC waiver program was supplemented by a new lifeline program, which has become known as "Link Up America," that is targeted to provide assistance to reduce the initial service installation and connection charges that appear to be a major barrier to subscribership for low income groups.[7] We also reviewed the existing USF high-cost assistance measures, which permit LECs in study areas with above-average loop costs to allocate additional costs to the interstate jurisdiction. We adopted a Joint Board recommendation to retarget the high-cost assistance to provide greater assistance to small and medium-size LECs and less assistance to larger LECs.[8]

6. The costs associated with the lifeline assistance[9] and USF programs are currently part of the common line revenue requirement and are recovered through the CCL charge.[10] Upon implementation of the proposed revisions to the present pooling mechanism on April 1, 1989, our rules provide that NECA will administer separate lifeline assistance and USF cost/revenue "pools" and that the costs will be recovered through flat-rate, per-line charges assessed on IXCs based on the number of "1+" lines "presubscribed" to each such carrier.[11] The separate lifeline and USF charges are to be assessed on IXCs that have at least (1) one percent of the total presubscribed lines in all study areas, or (2) five percent of the presubscribed lines in any study area and a minimum of 1000 presubscribed lines in that study area. In recommending this approach, the Joint Board observed that this formula fairly distributes the responsibility for lifeline and high-cost funding among more than just the few largest IXCs, and also takes into account the fact that an IXC could be the dominant carrier in a particular area, even though it may not have a substantial presence nationwide.[12]

7. Our rules require LECs to provide the information necessary to determine the allocation of presubscribed lines among IXCs. Each LEC must report to NECA, on a semi-annual basis, the number of "1+" access lines asso-

ciated with each IXC serving a study area, and NECA will use the data to update the listing of the IXCs' presubscribed lines. NECA will compute and directly bill the charges to qualifying IXCs on an annual basis and will administer the lifeline and USF funds, including distribution of revenues to the LECs.[13]

8. At the end of 1987, NECA conducted a voluntary data collection to gather data for developing a workable billing system for the new billing arrangements.[14] NECA received the requested data from most of the LECs in January 1988. NECA reported the results of this presubscribed lines data collection in a June 2, 1988, letter to the Chief of the Common Carrier Bureau.[15] That letter explained that, using the preliminary data, NECA had identified IXCs that would be assessed lifeline and USF charges under the criteria required by our rules. According to NECA, this study revealed that several very small IXCs would be billed for USF and lifeline under the current rules, while other medium-sized IXCs would not. It observed that this result occurred because certain smaller IXCs with all their lines concentrated in a single study area meet the five percent threshold, whereas other IXCs with much larger total numbers of presubscribed lines operate in a number of study areas -- and thus fail to qualify under either the "one percent" or the "five percent" criteria.

9. NECA attached a chart to its June 2, 1988, letter to illustrate this phenomenon. The chart excluded the three largest IXCs, which would each qualify under the one percent criterion, and provided a sampling of the remaining IXCs. The chart indicated that three medium-sized IXCs, with .61, .18 and .16 percent of all presubscribed lines respectively, would not be assessed the lifeline and USF charges because those IXCs had neither one percent of the lines nationwide, nor five percent in one study area (1000 lines minimum). By contrast, smaller IXCs with .07, .05, .02, and.01 percent of all presubscribed lines respectively, would pay the charges because those IXCs each had more than five percent of the lines in a single study area.

10. On July 22, 1988, the Chief of the Common Carrier Bureau requested additional information from NECA.[16] His letter asked for further data on which IXCs would be billed for the lifeline and USF charges utilizing the presubscribed lines criteria set forth in our existing rules. The letter also sought similar information relating to which IXCs would be required to pay the USF and lifeline assessment if the standard relating to presubscribed lines within a single study area were eliminated altogether and the nationwide percentage were set at lower threshold levels.

11. In response, NECA provided an analysis of the data submitted by LECs in January 1988.[17] NECA's analysis indicates that, under our current rules, a total of 26 IXCs would be billed for the lifeline and USF charges. This group does not, however, include three of the ten largest IXCs, yet would encompass the eighty-fourth largest IXC because of the "five percent in a study area" rule. NECA noted that the smallest qualifying IXC under the present rules has only 3,773 presubscribed lines, and its estimated monthly billing amount (based on a. 25 per-line charge) would be 943.

12. NECA's analysis also provided data on which IXCs would qualify if the threshold were .25, .10, .05, .025 or .01 percent of nationwide lines, and the criterion of five percent of presubscribed lines in a study area were eliminated altogether. NECA responded that, as detailed in Appendix A, at these percentages, 6, 15, 23, 40, and 62 IXCs, respectively, would qualify to be billed for the lifeline and USF charges. For all these scenarios, however, the number of presubscribed lines and estimated monthly billing amount for the smallest IXC captured would be significantly greater than for the smallest IXC under our current rules. Moreover, because the criterion used is a simple nationwide size threshold, all of the IXCs over the specified threshold would qualify -- as compared to the existing approach, which would result in only some of the larger IXCs contributing toward the costs of these programs.

III. DISCUSSION

13. From the information before us, we tentatively conclude that the results of the existing mechanism described in Sections 69.5, 69.116 and 69.117 of our rules for determining which IXCs must pay lifeline and USF charges are not consistent with the expectations of the Joint Board or this Commission in formulating these rules. According to the information provided by NECA, the presubscribed lines criteria specified in our existing rules would capture some very small IXCs, but would excuse some large IXCs from the obligation to pay these charges. We tentatively conclude that this unanticipated result would inappropriately favor those larger IXCs that would be exempted from paying these charges. At the same time, the current rules would discriminate against certain very small carriers that would have to pay the charges simply because their lines were concentrated in one study area.

14. In light of the information discussed above, we propose to modify our rules to eliminate the requirement that IXCs with five percent of lines in a study area (minimum 1000 lines) be assessed the lifeline and USF charges. We consider that the current five percent rule produces results that are inequitable and discriminatory. Moreover, we believe that, if we revise the nationwide percentage to a lower level, those larger regional IXCs that the five percent requirement was originally designed to capture will still qualify to be assessed these charges.

15. We also propose to change the nationwide percentage threshold from one percent to .05 percent of all presubscribed lines. It appears that this revised approach will result in approximately the same number of IXCs paying the lifeline and USF charges as would be the case under our current rules, and thus meets our concern that the burden of funding these programs be shared among a reasonable number of IXCs, and not left to only a very few of the largest carriers. Moreover, this percentage seems to represent the best balance between our desire to share the burden of funding these programs among a reasonable number of IXCs, and the necessity of ensuring that the administrative costs of applying the charges do not become infeasible. The information provided by NECA suggests that, if a threshold lower than .05 percent were chosen (*e.g.*, .025 or .01 percent), the administrative burdens and cost of determining which carriers fall within the prescribed levels, and of calculating and billing the charges for those carriers, could outweigh the benefits of sharing the cost of these programs among an even larger number of IXCs. For example, if .05 percent is designated as the threshold level, approximately 23 carriers will be assessed the charges, according to the NECA analysis. If

.025 percent is chosen as the threshold, approximately 40 IXCs will be charged. This would mean that NECA would have to review the presubscribed lines figures, calculate the charges, and bill an additional 17 IXCs for minimal levels of contributions. This additional administrative effort does not appear justified by the relatively small contributions that NECA estimates would be collected from the smaller carriers through these particular charges.

16. Appendix B describes proposed amendments to Sections 69.5(d), 69.116(a) and 69.117(a) of our rules to reflect these proposals. We request comment on both our proposal to eliminate the five percent in a study area rule, and on our corresponding proposal to adjust the percentage of nationwide presubscribed lines threshold to determine which IXCs would be billed. We request specific comment on our proposal to adopt the alternative threshold of .05 percent of all presubscribed lines as the sole criterion to establish which IXCs would qualify to contribute to the lifeline and USF funds on a per-line basis.[18]

IV. PROCEDURAL MATTERS

17. Pursuant to Sections 1, 4(i)-(j), and 403 of the Communications Act of 1934, as amended, and Section 553 of the Administrative Procedure Act, NOTICE IS HEREBY GIVEN of a proposal to amend Part 69 of this Commission's rules.

18. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements that are applicable to the public, and will not increase or decrease burden hours on the public.

19. Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 605(b), this Commission certifies that the proposals made in this Notice will not have a significant economic impact on a substantial number of small entities. Exchange carriers will not be affected by any action on the proposals presented in this Notice. This Notice will affect which IXCs will be assessed charges for our lifeline and USF programs, however the proposal described in the Notice would result in fewer small IXCs being billed for these programs than are billed under our current rules, and thus will have a net positive effect on smaller IXCs as compared to the existing requirements. As provided by Section 605(b) of the Regulatory Flexibility Act, since this Commission is making this certification Sections 603 and 604 of the Act do not apply to the rules we propose in this Notice.[19]

20. All interested persons may file comments on the proposal discussed in this Notice no later than December 14, 1988, and reply comments may be filed not later than December 29, 1988. In accordance with the provisions of Section 1.419 of our Rules, an original and five copies of all statements, briefs, comments, or reply comments shall be filed with the Secretary, Federal Communications Commission, 1919 M Street, Northwest, Washington, D.C. 20554. All such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C. offices.

21. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[20] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[21]

22. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[22] Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates.[23]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A - (Chart attached to NECA's Letter Dated August 10, 1988)

ANALYSIS OF ALTERNATIVE PSL QUALIFICATION CRITERIA

DATA ITEM	CURRENT RULES	.25% NATIONWIDE	.10% NATIONWIDE	.05% NATIONWIDE	.025% NATIONWIDE	.01% NATIONWIDE
Total Qualifying IXCs Lines	26	6	15	23	40	62
Percent of Qualifying Lines	97.293	96.809	98.104	98.693	99.297	99.634
Numerical Rank by Size of IXCs Qualifying	1-3, 5-7 10-13, 15, 17-19, 23, 25, 27, 28, 34, 36, 38, 41, 52, 54, 70, 84	1-6	1-15	1-23	1-40	1-62
Presubscribed Lines of Smallest Qualifying IXC	3,773	173,897	68,559	36,092	17,370	7,341
Approximate Monthly Billing Amount of Smallest Qualifying IXC	$943	$43,474	$17,140	$9,023	$4,343	$1,835

Source: Voluntary EC Data Submission of 6/30/87 PSL counts conducted in January 1988.

APPENDIX B

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 - ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.5 is amended by revising paragraph (d) to read as follows:

§ 69.5 Persons to be assessed.

Effective April 1, 1989:

* * * * *

(d) Beginning on April 1, 1989, Universal Service Fund and Lifeline Assistance charges shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

3. Section 69.116 is amended by revising paragraph (a) to read as follows:

§ 69.116 Universal service fund.

Effective April 1, 1989:

(a) A charge that is expressed in dollars and cents per line per month shall be assessed beginning on April 1, 1989, upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

* * * * *

4. Section 69.117 is amended by revising paragraph (a) to read as follows:

§ 69.117 Lifeline assistance.

Effective April 1, 1989:

(a) A charge that is expressed in dollars and cents per line per month shall be assessed beginning on April 1, 1989, upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

* * * * *

FOOTNOTES

[1] *See infra* para. 5.

[2] This date and these new procedures correspond to the new common line pooling arrangements that will become effective on April 1, 1989. *See infra* note 5.

[3] *See* 47 C.F.R. §§ 69.116 & 69.117 (1987).

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 2 FCC Rcd 2324 (1987) (hereinafter *Recommended Decision)*.

[5] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Report and Order*, 2 FCC Rcd 2953 (1987) (hereinafter *NTS Recovery Order)*. This order provided that the first .60 increase would be implemented on July 1, 1987, the second .60 increase on December 1, 1988, and the third .30 increase on April 1, 1989. The last SLC increase would accordingly be implemented on April 1, 1989, the same date set for implementation of the modifications we adopted in the existing common line tariff and pooling system. Under this new pooling framework, LECs will be permitted to withdraw from the NECA common line tariff and pool subject to certain conditions, and file tariffs based on their own costs. LECs leaving the pool would, however, be obligated to make payments to the common line pool to keep the pooled carrier common line (CCL) rates essentially unaffected.

[6] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Memorandum Opinion and Order on Reconsideration and Order Inviting Comments*, 3 FCC Rcd 4543 (1988) (hereinafter *NTS Recovery Reconsideration Order), petition for review pending, Public Service Commission of the District of Columbia v. FCC*, D.C. Cir. No. 88-1661 (petition filed Sept. 12, 1988). One of these modifications, adopted in response to a petition for reconsideration from NECA, was a change in the date for the initial LEC submission of presubscribed lines data from January 2, 1989, to August 1, 1988, to afford NECA adequate time to develop an efficient billing system. We also changed the annual date for the submission of presubscribed lines data from January 2 to December 30 of each year to conform to the filing dates for optional updates of USF data.

[7] The Link Up America Program will offset one half of the charges for commencing telephone service, up to$30, for qualifying households. The program also encourages LECs to offer deferred payment schedules for these charges by paying a LEC's interest costs, on an amount up to 200, when the LEC establishes a deferred payment schedule and does not charge interest to qualified subscribers. *See NTS Recovery Order* at para. 17.

[8] This assistance is designed to reduce the intrastate cost allocation to keep local service rates lower than they would otherwise be in high-cost areas.

[9] In this context, by "lifeline assistance" we refer to both the expanded SLC waiver and the Link Up America programs.

[10] *See Recommended Decision* at paras. 71 & 87. We note that the present funding mechanism simply includes all high cost and lifeline assistance costs in a pooled common line revenue requirement, which is recovered through a nationally averaged CCL rate. Thus, there is no additional administrative burden that arises from assessing these charges on all users of switched access services. In the depooled CCL environment, however, we concluded that, in order to continue these nationwide programs,

the most practical funding mechanism was to continue to pool the costs and recover them through non-traffic-sensitive charges on IXCs, the larger users of access services.

[11] *See* 47 C.F.R. §§ 69.116 & 69.117. For purposes of this requirement, the term "presubscribed lines" encompasses all 1+ access lines, and, thus, includes AT&T's Feature Group C lines in offices not yet converted to equal access. *See Recommended Decision* at para. 71; *NTS Recovery Order* at para. 19.

[12] *Recommended Decision* at paras. 71, 76 & 87.

[13] *See* 47 C.F.R. §§ 69.116 & 69.117.

[14] NECA had requested on reconsideration of the *NTS Recovery Order* that we modify our rules to require the initial submission of presubscribed lines data from the LECs by December 1987 in order to permit it sufficient time to develop a billing system. A letter from the Common Carrier Bureau informed NECA that, given the timing of the order on reconsideration, a voluntary data request to the LECs would best address NECA's immediate needs. *See* Letter from Gerald Brock, Chief, Common Carrier Bureau, to Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, NECA (December 14, 1987).

[15] *See* Letter from Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, to Gerald Brock, Chief, Common Carrier Bureau (June 2, 1988).

[16] *See* Letter from Gerald Brock, Chief, Common Carrier Bureau, to Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, NECA (July 22, 1988).

[17] *See* Letter from Jacob J. Goldberg, Vice President-Tariff, Cost and Regulatory Matters, NECA, to Gerald Brock, Chief, Common Carrier Bureau, (August 10, 1988). The chart included in this letter which provides the data analysis is attached to this Notice as Appendix A.

[18] If commenting parties wish to propose other nationwide threshold levels, they should include in their comments a discussion of the advantages to be gained if we were to adopt the threshold level they advocate.

[19] In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Notice in the Federal Register.

[20] *See generally* 47 C.F.R. § 1.1206(a) (1987).

[21] *See* 47 C.F.R. §§ 1.1202(f) & 1.1203.

[22] *See* 47 C.F.R. § 1.1202(b).

[23] *See* 47 C.F.R. § 1.1206.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal No. 1417

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: February 10, 1989; Released: February 17, 1989

By the Chief, Common Carrier Bureau:

1. On November 21, 1988, AT&T Communications (AT&T) filed Transmittal No. 1417. By this transmittal, AT&T proposes to introduce a new, nationwide, interactive service called AT&T MultiQuest (MultiQuest), which will permit a large number of simultaneous calls to a single 900 telephone number. On November 30, 1988, INFOTEL INC., an information provider (IP), filed a petition to reject or in the alternative to suspend and investigate, which contained a copy of its informal complaint currently pending in the Enforcement Division. AT&T filed a reply on December 16, 1988.[1] The effective date of Transmittal No. 1417 is February 19, 1989.

2. MultiQuest is a new service which will permit multiple, simultaneous, interactive communications on a nationwide basis over AT&T's Switched Network, via a 900 telephone number assigned by AT&T to a particular customer. In its petition, INFOTEL alleges that Transmittal 1417 contains several provisions which are currently under challenge in its informal complaint (Enforcement Division File No. IC-88-07184) pending before the Enforcement Division of the Common Carrier Bureau. INFOTEL contends that AT&T is engaging in certain billing practices in violation of the current 900 Premium Billing Agreement. INFOTEL is compensated pursuant to the "promotional billing" agreement it had with AT&T. From June 3, 1986, until July 31, 1988, according to INFOTEL, it was not charged any federal excise tax with respect to "premium billing" revenues. Then, in August 1988 AT&T informed INFOTEL that AT&T would begin deducting from INFOTEL'S gross revenues a 3 percent federal excise tax based on the tariffed portion of 900 Service call volume.

3. In response to the Decentralized Data letter and INFOTEL's petition AT&T states that neither party raises any issues which would justify rejection or suspension and investigation. For example, says AT&T, neither party challenges any aspect of the MultiQuest Service, or the revenue, demand, and cost data that AT&T submitted in support of the tariff. AT&T also argues that questions of taxation are within the jurisdiction of the Internal Revenue Service (IRS) and that its tax collection methods comport with IRS regulations.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We find that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection and that an investigation of the revisions is not warranted at this time.

5. IT IS THEREFORE ORDERED that the petition to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 1417, filed by INFOTEL, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] In addition to the INFOTEL petition, we received a letter from Decentralized Data, another IP, which requested that we delay the effective date of Transmittal 1417 until the end of February to allow it more time to file a response to the tariff. Letter from R. Ahern, President and General Manager, Decentralized Data, to Secretary, FCC, Nov. 30, 1988. On December 23, 1988, Decentralized Data filed a response to AT&T's December 16 reply. The Commission's Rules do not allow for the filing of responses to a publishing carrier's reply to petitions seeking relief in the case of a tariff filing. *See* Section 1.773(b) of the Commission's Rules, 47 C.F.R. § 1.773(b). Accordingly, Decentralized Data's response to AT&T [illegible]ply is dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-136

In the Matter of

BellSouth Telephone Company Revisions to Tariff F.C.C. No. 1	Transmittal No. 229
General Telephone Operating Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 478 and 479
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Revisions to Tariff F.C.C. No. 1	Transmittal No. 226
New York Telephone Company Revisions to Tariff F.C.C. No. 41	Transmittal Nos. 959 and 962
Pacific Bell Telephone Company Revisions to Tariff F.C.C. No. 128	Transmittal No. 1394
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal No. 1766

ORDER

Adopted: February 14, 1989; Released: February 17, 1989

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from February 22, 1989, to March 13, 1989. None of the revisions is opposed.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[2] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that BellSouth Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 229, General Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal Nos. 478 and 479, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 226, New York Telephone Company, Tariff F.C.C. No. 41, Transmittal Nos. 959 and 962, Pacific Bell Telephone Company, Tariff F.C.C. No. 128, Transmittal No. 1394, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1766, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-151.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also proposed ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988); Public Notice, Network Communications, Inc. Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal Nos. 202 and 214

Tariff F.C.C. No. 1

ORDER

Adopted: February 15, 1989; Released: February 17, 1989

By the Chief, Common Carrier Bureau:

1. On November 15, 1988, BellSouth Telephone Companies (BellSouth) filed Transmittal No. 202, proposing to revise its charges for updating the Network Channel Interface (NCI) code and to introduce a new charge for mechanized NCI updates for sub-DS1 special access (DSO) services. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the tariff[1] and BellSouth filed a reply.[2] The effective date of the tariff is February 20, 1989.

2. Transmittal No. 202 provides for nonrecurring charges and regulations applicable to the mechanized updating of NCI codes for DSO services. BellSouth claims that it is proposing mechanized updating in response to customer demand. In addition, BellSouth proposes to revise the existing nonrecurring charges applicable to manual updates for NCI codes for DSO services to reflect costs which were inadvertently omitted from the cost development for the existing manual charges.

3. The present charge for a manual update is 47.97; BellSouth proposes to increase that charge to 104.98 per circuit. MCI alleges in its petition that these charges are excessive. According to MCI, the process required to change the NCI when circuits of a DS-1 are converted to DS-3 special access is a "relatively simple task," but that BellSouth gives the impression that a significant amount of work is involved with the change. Petition at 3. MCI also questions BellSouth's assertion that it "missed" the alleged additional costs and disputes whether these costs are actually incurred by BellSouth for this simple record change. *Id.* at 3. Finally, MCI notes that BellSouth does not propose to reduce any other charges that have costs associated with the computer time it says it used for NCI, and speculates that the costs associated with these general support facilities have already been accounted for in previous BellSouth rates. *Id.* at 4 n.7.

4. BellSouth responds that the cost development for the nonrecurring charges for both the mechanized and manual updating of NCI codes are fully supported and consistent with Commission policy that nonrecurring charges should recover the full cost of performing such activities. Reply at 2. BellSouth states that there is no basis for MCI's claim that these charges be suspended because BellSouth inadvertently failed to include several work activities associated with nonrecurring charges in its original cost development data filed under Transmittal No. 151 on April 1, 1988. *Id.* at 8. BellSouth also refutes MCI's contention that the work involved in changing NCI codes is minimal by describing the actual work involved in both the mechanized and manual processes. *Id.* at 4-7. Finally, BellSouth asserts that MCI's claim that BellSouth has included costs in the development of the charges for NCI code updates which it is already recovering elsewhere is merely speculative. *Id.* at 4.

5. The Common Carrier Bureau has reviewed the tariff transmittal, the petition, and BellSouth's reply. We find that no compelling argument has been presented that the tariff transmittal is patently unlawful so as to require rejection or that the transmittal warrants an investigation at this time.

6. IT IS THEREFORE ORDERED that the petition against BellSouth Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 202, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Suspend and Investigate, filed Nov. 30, 1988 (Petition).

[2] BellSouth Reply, filed Dec. 12, 1988 (Reply).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PORTLAND CELLULAR PARTNERSHIP — File No. 27414-CL-P-152-B-86

For a construction permit to establish a new cellular system to operate on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Portland, Maine NECMA

MEMORANDUM OPINION AND ORDER

Adopted February 15, 1989; Released: February 28, 1989

By the Commission:

1. Northeast Cellular Telephone Company, L.P. (Northeast) and Saco River Cellular, Inc. (Saco River) (collectively, "petitioners") have both filed applications for review of the Mobile Services Division (MSD) order (*MSD Order*) granting the above-captioned application.[1] A consolidated opposition to the applications for review has been filed by the Portland Cellular Partnership (Port Cell).[2]

FINANCIAL QUALIFICATIONS

2. In their applications for review, both petitioners argue that the MSD failed to apply properly the financial qualification requirements of the Commission's rules. Specifically, petitioners contend that the letter submitted by Port Cell did not meet the "firm financial commitment" requirement. Northeast states that Section 22.917(b)(1) of the Commission's rules require that the tentative selectee "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system and shall amend its application to so demonstrate." However, the petitioners maintain that the letter submitted by Port Cell does not "guarantee availability." In support of its statement Saco River points to a term in the letter from NYNEX Credit Company (NYNEX Credit) which states that:

> The precise terms and conditions of any financing arrangement between the partnership and NYNEX Credit Company will be determined at the time financing is required.

According to Saco River this statement does not constitute a commitment in any literal or legal sense. In its view, the MSD's acceptance of the NYNEX Credit letter in satisfaction of the requirements of Section 22.917 was totally arbitrary and unfair to those applicants who in good faith attempted to conform to the rules.

3. In the words of Northeast, "the |NYNEX Credit| letter failed to contain any terms of the loan, failed to show that |NYNEX Credit| had assessed the creditworthiness of Port Cell and was committed to providing the financing, and failed to demonstrate that NCC had the funds available and uncommitted to any other cellular project." According to Northeast, Port Cell essentially confirmed these statements by submitting an additional letter, dated September 4, 1986 (after the 30 day deadline) in which NYNEX Credit affirmed that the funds were indeed available to Port Cell and were uncommitted to other projects. Northeast maintains that the MSD relied on this late filed submission in concluding that an adequate financial commitment had been demonstrated in violation of Bureau precedent, citing *American Lo - Power TV Network, Inc.*, 103 FCC 2d 4, 10 (1986). Northeast concludes that the MSD failed to follow its own rules and applied them in an arbitrary and capricious manner.

4. In its opposition, Port Cell challenges the petitioners' claim that the MSD ignored relevant regulatory standards in determining that Port Cell is financially qualified to construct and operate the Portland system for one year. Port Cell notes that both Saco River and Northeast do not maintain that Port Cell is financially unqualified to construct and operate the Portland system. Port Cell states that the financial letter received is a firm financial commitment from NYNEX Credit an affiliate of NYNEX Mobile, which is a 45% owner of Port Cell. The July 18 letter stated unequivocally that it was confirming

> that NYNEX Credit Company is prepared to make available to Portland Cellular (the partnership) a total credit package of3 million for the construction and operation of a cellular telephone system in Portland, Maine.

In Port Cell's view, this statement clearly evidenced that it had met its obligation to "obtain a firm financial commitment" within 30 days of its designation as tentative selectee. Port Cell continues that the July 18, 1986 commitment to Port Cell is from a financial institution, NYNEX Credit has in excess of45 million in financing facilities in place, enjoys excellent bond and commercial paper ratings, and functions as the credit financing arm of NYNEX Corporation. According to Port Cell, Northeast's argument that NYNEX Credit did not assess the creditworthiness of the partnership is error in light of NYNEX Mobile's 45% interest in Port Cell.

DISCUSSION

5. We find that Port Cell's financial showing is defective in two respects. Nevertheless, for the reasons set forth below, we find good cause for waiving, on our own motion, the requirements at issue, and we affirm the Bureau's grant of Port Cell's application. *See* 47 C.F.R. Section 1.3.

6. Both of the defects in Port Cell's financial showing derive from its loan commitment letter from NYNEX Credit. [3] First, the letter does not "set forth the terms of the loan commitment," as required under the firm financial commitment standard applicable in this case. *Cellular*

Lottery Reconsideration Order, 101 FCC 2d 577, 590 (1985). *See also American Lo - Power TV Network, Inc.*, 103 FCC 2d 4, 10 (applying the loan terms requirement under the former "reasonable assurance" standard). Second, the letter from NYNEX Credit, which we will treat as a "recognized lending institution,"[4] does not "evidence the lender's determination that it has assessed the creditworthiness of the loan applicant. . . ." 47 C.F.R. Section 22.917(b)(1)(i).

7. Our analysis starts with the policies served by the firm financial commitment requirement. The purposes for this requirement for applications in Metropolitan Statistical Areas were two-fold: (1) "to deter speculative, insincere applicants from abusing the lottery process and causing excessive cost and delay in its administration"; and (2) to "more efficiently and effectively assure that lottery entrants are *bona fide* applicants possessing a demonstrated ability to construct and operate a high quality, competitive cellular system." *Cellular Lottery Reconsideration Order*, 101 FCC 2d at 590. Subsequently, the Commission appeared to suggest that the second policy was the more important of the two. *Cellular Lottery Further Reconsideration Order*, 59 RR 2d 407, 412-413 (1986). *See also Armstrong Cellular Telephone Co.*, 3 FCC Rcd 1665 (1988) ("[t]he purpose of that rule is to determine quickly whether a tentative selectee is financially qualified so that a grant may be made and that service to the public is commenced").

8. We believe that a waiver in this case will "not undermine the polic[ies], served by the rule," and, indeed, will further those policies. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *see also WITN - TV v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988). Based on our experience regarding NYNEX Mobile (which holds a 45 percent interest in Port Cell) and its corporate parent NYNEX Corporation in other cellular markets, and indeed in other common carrier contexts, we are quite confident in concluding that no speculation is involved here.

9. With respect to financial qualifications, Northeast itself concedes that NYNEX Credit "obviously has adequate resources to fund the system." Northeast Application for Review at 8. Moreover, again based on our experience regarding NYNEX Mobile and NYNEX Corporation in other markets and other contexts, and materials on file in other proceedings of which we take official notice,[5] we are quite confident that Port Cell (whose financing was arranged through NYNEX Mobile) is financially qualified. Affirming the Bureau's grant to Port Cell therefore fully accomplishes the rule's purpose of getting service to the public by a qualified applicant expeditiously. *See generally U. S. West NewVector Group, Inc.*, 2 FCC Rcd 5431 (1987).[6]

10. We recognize that we have previously indicated that "strict compliance" with our firm financial commitment requirements is "generally warranted." *Armstrong Cellular Telephone Co.*, 3 FCC Rcd at 1665; *Cellular Lottery Further Reconsideration Order*, 59 RR 2d at 413. Nevertheless, we have the discretion to waive strict enforcement when doing so would serve the policy goals involved and the overall public interest. *See, e.g., WAIT Radio*, 418 F. 2d at 1157; *Armstrong Cellular Telephone Co.*, 3 FCC Rcd at 1665. In light of our lengthly experience in dealing with NYNEX Corporation and its various subsidiaries and affiliates (as well as matters on file of which we take official notice), we believe that the public interest would not be served by inflexibly applying our firm financial commitment requirements to disqualify an entity that indisputably has not engaged in speculation and is financially qualified.[7] Nothing in the Communications Act, our rules or case law requires such a wooden approach.

11. We are mindful of petitioners' concern that we not apply our rules more favorably to large entities than small ones. Indeed, we agree, that as a general matter, all applicants should be treated equally regardless of size, and we have not hesitated to enforce strictly our cellular radio rules against large wireline carriers. *See, e.g., PacTel Mobile Access*, 1 FCC Rcd 564 (1986) (denying request by subsidiary of a Bell Regional Holding Company for waiver of rule requiring correct market number to be on the cover of a cellular application); *Bell Atlantic Mobile Systems*, 103 FCC 2d 171, 177-78 (1986) (returning as defective application of subsidiary of Bell Regional Holding Company for failure to provide required explanation in support of contour extension). Nevertheless, we must also guard against inflexibly treating all applicants alike when to do so would, because of unusual circumstances, lead to a result clearly contrary to the public interest. In our view, that is the case here. In determining whether to waive our firm financial commitment requirements in this case, we believe it is fair to take into account the application and license record with the Commission of NYNEX Corporation and its affiliates. This record substantiates in this case the financial capability of the applicant, notwithstanding an absence of some of the usually required specificity regarding financial commitment terms. This decision is not based on the size of the entity, but its record with the Commission.

SECTION 22.921 WAIVER REQUEST

12. In addition to the financial qualifications argument, Saco River objects to the MSD's failure to enforce the cross-ownership prohibitions. Saco River essentially reiterates arguments raised in its petition to deny that two wireline applicants with common ownership were allowed to participate in the lottery, thus distorting the settlement process. Because of the common ownership, both Northeast and Saco River refused to enter into a settlement agreement with the other parties. According to Saco River, if Community or Seacoast had been disqualified before the lottery, the dynamics of the settlement discussions would have been vastly different. Saco River argues that the MSD permitted private parties to effect substantive changes in the Commission's rules in this case through the procedural device of a waiver request. Saco River alleges that Seacoast and Community both filed defective applications under Section 22.921, but because they were accompanied by a request for a waiver of the rules, the MSD eliminated the defect with respect to one of the applicants. In Saco River's view, this is a capricious application of regulations.

13. Saco River contends that the MSD should have decided this case under the guidance of the Commission's decision in *Horseshoe Partnership*, 103 FCC 2d 414 (1986). In that case, the Commission returned Horseshoe's application along with two others in the Columbia, South Carolina market because of common ownership. Horseshoe argued for reconsideration on the ground that because the other two applications had been dismissed, it was not guilty of any cross-ownership violations. Horseshoe argued that Section 22.291 applies only to accepted

applications. The Commission refused to accept Horseshoe's application stating that to do so would in effect "nullify the multiple ownership prohibition." 103 F.C.C. 2d at 419. Saco River argues that *Horseshoe Partnership* supports its position for the dismissal of Port Cell's application.

14. In opposition, Port Cell argues that the MSD was correct in accepting the applications of Seacoast and Community. Port Cell states that both applicants acknowledged from the start that their cross-ownership was inconsistent with Section 22.921(b) of the Commission's rules. However, since the two companies were, and are, separately managed and operated, and because the common ownership was by passive investors, Community and Seacoast believed a waiver of Section 22.921 was warranted. According to Port Cell, there is no Commission precedent which holds that an application is defective merely because it contains a request for waiver of the Commission's rules, even if that waiver is ultimately denied. In this case, Port Cell contends that the alternative provided in both waiver requests was dismissal of Community's application. Port Cell points out that had the MSD denied the waiver request prior to the lottery, Community's application would have been dismissed. Port Cell suggests that the alternative relief adopted by the Commission had the same effect as the dismissal of Community's application.

15. Port Cell distinguishes the Commission's decision in *Horseshoe Partnership supra*, relied upon by Saco River. Port Cell notes that in that case, one individual held 49% of three applications as General Partner, did not seek a waiver, and sought to have one application reinstated on the ground that the violation no longer existed after all three were dismissed. Seacoast and Community, on the other hand, with minimal, passive cross-ownership, complied with the Commission's procedural rules, specifically brought their cross-ownership problem to the Commission's attention, requested a waiver, and provided in their waiver request an alternative that would cure their noncompliance with the cross-ownership rules. Port Cell emphasizes the fact that Horseshoe got "caught" trying to evade the Commission's scrutiny, while the applicants in this case hid nothing.

DISCUSSION

16. Although Saco River continues to complain that Community and Seacoast received an unfair advantage in the lottery, it presents no evidence to support this view. As the MSD stated, both applications as filed were complete, complied with the requirements of Section 22.19 for requesting waivers, and therefore, were not defective.

17. Both Community and Seacoast requested a waiver of the rule prohibiting cross-ownership by two or more cellular applicants in the same market. In the alternative, that is, if the requests were denied, the parties asked that Community's application be dismissed. This request was in full compliance with Section 22.19 of the Commission's rules.[8] The MSD did not act on the waiver requests, but it, in effect, adopted the parties' suggestion that Community's application not be considered in the lottery. In its letter of 27 May declining to act on the waiver requests, the MSD stated that if Community's application was chosen first in the lottery, the second-ranked application would then be substituted as the tentative selectee. In effect, then, Community's application was dismissed because it could not have won the lottery and could not have been selected as the lottery winner. Clearly, then, since Community's application could not be the lottery winner, Saco River's arguments that Community and Seacoast received two chances in the lottery is erroneous.[9] The MSD's disposition of this issue is fully consistent with the rules and policies of the Commission.

18. Accordingly, the Applications for Review filed by Northeast Cellular Telephone Company, L.P. and Saco River Cellular, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy,
Secretary

APPENDIX

Service	Call Sign	File No.	Market
Cellular Radio	KNKA246	00383-CL-MP-88	Albany, NY
Cellular Radio	KNKA201	00243-CL-MP-87	Boston, MA
Cellular Radio	KNKA203	00313-CL-MP-87	Buffalo, NY
Cellular Radio	KNKA675	00680-CL-L-88	Glens Falls, NY
Cellular Radio	KNKA206	00321-CL-MP-88	Long Branch, NY
Cellular Radio	KNKA251	00238-CL-MP-87	New Bedford, RI
Cellular Radio	KNKA206	00320-CL-MP-88	New Brunswick, NJ
Cellular Radio	KNKA744	27414-CL-CP-86	Portland, ME
Cellular Radio	KNKA233	00252-CL-MP-87	Providence, RI
Cellular Radio	KNKA252	00237-CL-MP-87	Springfield, MA
Cellular Radio	KNKA238	00014-CL-MP-88	Syracuse, NY
Cellular Radio	KNKA237	00277-CL-MP-87	Worcester, MA
Cellular Radio	KNKA580	00020-CL-MP-88	Orange County, NY
Cellular Radio	KNKA416	00192-CL-MP-88	Poughkeepsie, NY

Service	Call Sign	File No.	Market
Paging	KAD510	20254-CD-ML-06-82	New York City- Long Island
Paging	KRH629	22841-CD-R-01-70	Syracuse, NY
Paging	KT5237	22612-CD-R-01-70	Buffalo, NY
Paging	KNKG616	21408-CD-P/L-01-87	NE U.S. Region
Paging	KEA860	22663-CD-MP/ML-01-84	Fairfield, CT; Nassau, NY; Westchester, NY; New York City, NY; Suffolk, NY
Paging	KPE453	23202-CD-P/L-01-82	Monroe, NY
Paging	KNKB787	21028-CD-PL-01-82	White Plains, NY; New York City, NY
Paging	KNKB786	21024-CD-P/L-01-82	Hartcord, CT
Paging	KNKG616	23765-CD-P/L-A-01-87 21408-CD-P/L-01-87	East Hampton, NY; Kingston, NY; Seaside Heights, NJ; Brattleboro, NY Easton, PA; York, PA; New London, CT; Cumberland, ME; Salisbury, MD; Hyannis, MA; Richmond, VA; Fredericksburg, VA; Loconia & Claremont, NH
Paging	KCI299	20326-CD-ML-01-77	New Haven, CT; Hartford, CT
	KEA627	24594-CD-ML-01-83	New York City, NY
	KEA260	20421-CD-ML-01-84	Brooklyn, NY New York City, NY

Paging	KAD512	20041-CD-ML-01-81	Glen Oaks, NY; Staten Island, NY
Paging	KOR531	22311-CD-L-01-84	Philadelphia, PA Camden, NJ
Paging	KNKB782	21028-CD-P-4-82	Hackensack, NJ

Service	Call Sign	File No.	Market
IMTS/Paging	KEA763	22993-CD-AL-16-85	New York, NY
IMTS	KEC938	22715-CD-R-12-78	Long Island, NY
IMTS	KEA772	22829-CD-R-09-78	Utica, NY
IMTS	KEA769	22827-CD-R-05-70	Highland, NY
IMTS	KEA770	22714-CD-R-12-78	Albany, NY
IMTS	KED356	20886-CD-ML-02-79	Newark, NJ
IMTS	KED361	22840-CD-R-05-78	Hudson Valley, NY
IMTS	KUO586	20853-CD-P-03-81	Long Island, NY
IMTS	KED359	22839-CR-R-04-78	Newburgh, NY
IMTS	KEA773	20980-CD-ML-04-79	Syracuse, NY
IMTS	KEA774	20157-CD-ML-12-79	Buffalo, NY

Service	Call Sign	File No.	Market
Emergency Call Box	KNKJ919	21138-CD-P/L-01-87	New York, NY
Emergency Call Box	KNKJ959	21272-CD-P/L-01-87	Upstate, NY (Northway)

Service	Call Sign	File No.	Market
Air-to-Ground	KEC932	21675-CD-ML-03-77	Kew Gardens, NY
Air-to-Ground	KED350	201421-CD-R-02-75	Elmira, NY
Rural Radio	WD2749	60158-CD-P-L-81	Gardiners Island, NY
Point to Point Microwave Service	WLL877	10769-CF-P-87	Albany, NY
Point to Point Microwave Service	WLL878	10770-CF-P-87	Albany, NY
Point to Point Microwave Service	WLL879	10771-CF-P-87	Albany, NY
Point to Point Microwave Service	WLL876	10768-CF-P-87	Albany, NY
Point to Point Microwave Service	WLK881	1861-CF-P-88	Dutchess County NY
Point to Point Microwave Service	WLK894	1862-CF-P-88	Dutchess County NY
Point to Point Microwave Service	WLK895	1863-CF-P-88	Dutchess County NY
Point to Point Microwave Service	WLK896	1864-CF-P-88	Orange County, NY
Point to Point Microwave Service	WLK897	1865-CF-P-88	Orange County, NY

FOOTNOTES

[1] *Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mob. Ser. Div. 1987).

[2] Port Cell is a general partnership formed as a result of a partial settlement of the wireline applicants for the Portland cellular system. The partnership includes the tentative selectee in the lottery, Seacoast Cellular, Inc. (Seacoast), Community Service Telephone Company (Community) and NYNEX Mobile Communications Company (NYNEX Mobile).

[3] We will not accept Port Cell's late-filed amendment to its financial showing. An amendment correcting a defective financial showing constitutes a major amendment and is therefore not permissible under our rules. *See* 47 C.F.R. Section 22.918(b); *Armstrong Telephone Company*, 3 FCC Rcd 1665 (1988). While waiver of this procedural rule may be appropriate in certain "very special circumstances" *e.g.*, *Armstrong*, 3 FCC Rcd at 1666, no such circumstances are present here. In any event, even if Port Cell's amendment were accepted, the amendment would not correct the defect regarding the omission of certain loan terms.

With respect to an additional defect alleged by petitioners, we note that NYNEX Credit's loan commitment letter "confirm[ed]" that it was "prepared to make available" to Port Cell3 million for construction and operation of the Portland cellular telephone system. That this funding was contingent upon Port Cell meeting NYNEX Credit's "reasonable and ordinary credit criteria" and the submission of a "formal commitment" request by Port Cell does not make NYNEX Credit's financial commitment not firm. *See Lynn Juanes*, 2 FCC Rcd 4371 (Mob. Ser. Div. 1987); *Gary R. Zipper*, 2 FCC Rcd 1246 (Mob Ser. Div. 1987). These requirements appear to be standard language to make clear that, after grant of the construction permit, the permittee must formally request that the funds be provided pursuant to the commitment and must execute the necessary loan documents.

[4] While decisions regarding whether credit entities such as NYNEX Credit are recognized financial institutions have been somewhat inconsistent, compare *U. S. West NewVector Group, Inc.*, 2 FCC Rcd 5431 (1987) (treating credit subsidiary as a non-recognized financial institution) with *Contel Cellular, Inc.*, 2 FCC Rcd 4005 (Mob. Ser. Div. 1987) (holding that credit subsidiary is a recognized financial institution), we believe it is more appropriate to treat such credit subsidiaries, including NYNEX Credit, as recognized financial institutions, as they are in the business of regularly lending money. To the extent this conclusion is inconsistent with *U. S. West*, we hereby overrule that portion of *U. S. West*.

[5] *See American Information Technologies, Inc., BellSouth, Bell Atlantic, NYNEX, Pacific Telesis, Southwestern Bell, US West Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, 102* FCC 2d 1089 (1985); *Petition for Modification of the Permanent Capitalization Plan for NYNEX Business Information Systems Company*, 1 FCC Rcd 370 (1986), petition for further modification DA 87-632, File No. AAD 6-1507, released June 4, 1987; NYNEX Corporation 1987 Annual Report dated February 18, 1987; and NYNEX Corporation Form 10-K Annual Report dated March 28, 1988. *See also* Appendix listing public mobile service authorizations of NYNEX Mobile and its subsidiary, NYNEX Mobile Services Corporation.

[6] In *U.S. West*, the Commission found a subsidiary of U.S. West, Inc. to be financially qualified, and granted its application, despite the fact that it did not include all the requisite information from the lender (also a subsidiary of U.S. West).

[7] Our experience with NYNEX Mobile dates back to June, 1984, when New York SMSA Limited Partnership, in which NYNEX Mobile is the sole general partner, received its first cellular license.

[8] Section 22.19 provides:

> If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal whch complies with the Commission's rules.

[9] Moreover, the *Horseshoe* case cited by Saco River as supporting its position is misplaced. The distinctions cited by Port Cell are accurate and cannot be used as support for Saco River's proposition.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-325

In the Matter of

Amendment of Section 73.202(b), RM-6316
Table of Allotments,
FM Broadcast Stations.
(Ocean Springs, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1989; Released: March 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 3 FCC Rcd 4281 (1988), issued in response to a petition filed by Charles H. Cooper (petitioner), requesting the substitution of FM Channel 276C2 for Channel 276A at Ocean Springs, Mississippi. Petitioner also requested modification of its license for Station WOSM(FM), to specify operation on the higher class channel. Petitioner filed supporting comments in which he reaffirmed his interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 276C2 for Channel 276A at Ocean Springs, Mississippi, since it could provide the community with its second wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the current site of Station WOSM(FM).[1]

3. We have authorized a modification of petitioner's license for Station WOSM(FM), Ocean Springs, Mississippi, to specify operation on Channel 276C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Ocean Springs, Mississippi	233A, 276C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WOSM(FM), Ocean Springs, Mississippi, IS MODIFIED to specify operation on Channel 276C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Benchmark Communications Corp. 4700 S.W. 75th Avenue Miami, Florida 33155 (Permittee of Station WCCJ(FM), Chatom, Alabama)	John Wells King Haley, Bader & Potts 2000 M St., N.W. Suite 600 Washington, D.C. 20036-4574 (Counsel for Station WCCJ(FM))

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 276C2 at Ocean Springs are 30-24-34 and 88-42-23. As indicated in footnote 2 of the *Notice*, Channel 276C2 can be allotted to Ocean Springs provided Station WCCJ(FM), Channel 276A, Chatom, Alabama, relocates to Channel 291A, as it has been authorized to do in MM Docket 85-387. *See*, 51 FR 16322, May 2, 1986, effective June 2, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-23

In the Matter of

Amendment of Section 73.202(b), RM-6106
Table of Allotments,
FM Broadcast Stations.
(Ashland, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1989; Released: March 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 53 FR 5286, February 23, 1988, issued at the request of Bay Broadcasting Corp. (petitioner), licensee of Station WJJH(FM), Channel 244A at Ashland, Wisconsin, proposing the substitution of Channel 244C2 for channel 244A at Ashland and modification of the station's license accordingly. Petitioner filed supporting comments reiterating its intention to construct the high powered facility.

2. We believe the public interest would be served by the substitution of Channel 244C2 for Channel 244A at Ashland, Wisconsin, as the community could receive its first wide coverage area FM service. Channel 244C2 can be allotted to Ashland in accordance with the Commission's minimum distance separation requirements at the petitioner's current transmitter site.[1] Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence has been obtained from the Canadian government.

3. As requested, we are modifying the license of Station WJJH(FM) to specify operation on Channel 244C2 in lieu of Channel 244A in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Ashland, Wisconsin	244C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WJJH(FM), Ashland, Wisconsin, IS MODIFIED, to specify operation on Channel 244C2 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The site coordinates are 46-34-23 and 90-51-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-29

In the Matter of

Amendment of Section 73.202(b),	RM-5798
Table of Allotments,	
FM Broadcast Stations.	
(Anchorage, Alaska)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1989; Released: March 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 656 (1988), issued in response to a petition filed by Korlyn Broadcasting, Inc. (petitioner), licensee of Station KXDZ(FM),[1] Channel 276A, Anchorage, Alaska, proposing the substitution of Channel 277C2 for Channel 276A and modification of its license accordingly. Petitioner submitted late-filed comments in support of the proposal.[2] No other comments were received.

2. We believe the public interest would benefit by substituting Channel 277C2 for Channel 276A at Anchorage, Alaska, since it could provide the community with an additional expanded coverage FM service. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KXDZ(FM) to specify operation on Channel 277C2 in lieu of Channel 276A, as requested. A staff engineering study has determined that Channel 277C2 can be allotted to Anchorage at the petitioner's preferred site 6.8 kilometers (4.2 miles) southeast [3] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. As indicated in the *Notice*, since the proposed transmitter site for Station KXDZ(FM) is located within 80 kilometers of the Federal Communications Commission's monitoring station at Anchorage, petitioner should be aware of the technical requirements of Section 73.1030(c)(1)-(5) governing protection thereto.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Anchorage, Alaska	225C,247C1,251C1, 255C1,263C2,267C, 271C,277C2,281C1, 287C1,293C,298C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Korlyn Broadcasting, Inc. for Station KXDZ(FM), IS MODIFIED, effective **April 17, 1989,** to specify operation on Channel 277C2 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly Station KBLK(FM).

[2] Petitioner's comments were accompanied by a motion to accept. Since this is an uncontested proceeding, they will be accepted for the purpose of allowing petitioner to reaffirm its interest in pursuing its modification for Station KXDZ(FM).

[3] Reference coordinates at the petitioner's preferred transmitter site for Channel 277C2 are 61-09-58 and 149-49-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-236

In the Matter of

Amendment of Section 73.202(b), RM-5725
Table of Allotments,
FM Broadcast Stations.
(Carthage, Illinois)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1989; Released: March 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Bryan Broadcasting, Inc., (petitioner) of the *Report and Order*, 3 FCC Rcd 6454 (1988), which dismissed its request for the substitution of Channel 221B1 for Channel 221A at Carthage, Illinois, and the modification of its license for Station WCAZ(FM) to specify the higher powered channel, based on a lack of continuing interest.[1] Petitioner states that it did file comments restating its intention to apply for Channel 221B1, if allotted to Carthage, and has furnished a copy of a federal express record showing receipt by the Commission.

2. According to petitioner, supporting comments were timely filed but were never received by the Commission staff responsible for acting on petitioner's proposal. Petitioner now requests that we accept his expression of interest and substitute Channel 221B1 for Channel 221A at Carthage, Illinois. In view of the fact that this proceeding is uncontested, we will accept petitioner's late expression of interest.

3. We believe the public interest would be served by substituting Channel 221B1 for 221A at Carthage since it could provide the community with expanded service. Channel 221B1 can be allotted to Carthage in compliance with the Commission's minimum distance separation requirements with a site restriction.[2] As stated in the *Notice* the transmitter site for Channel 221B1 is restricted to 13.7 kilometers (8.5 miles) southwest of the city to avoid short spacing to Station WJRE(FM), Channel 221A, Kawanee, Illinois, and avoid overlap of the WKAZ's 60 dBu contour and the grade B contour of Channel 6 TV Station KWQC at Davenport, Iowa. As proposed, we shall modify petitioner's license for Station WCAZ(FM) to specify operation on the higher powered channel.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Carthage, Illinois	221B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WCAZ(FM), Carthage, Illinois, IS MODIFIED, to specify operation on Channel 221B1 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Bryan Broadcasting, Inc., IS GRANTED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the Petition for Reconsideration was given December 15, 1988, Report No. 1765.

[2] The coordinates at the restricted site are 40-18-01 and 91-11-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 2, 1989

POLE ATTACHMENT COMPLAINTS INTEREST RATE TABLE FOR REFUNDS AND ADDITIONAL PAYMENTS

For purposes of calculating interest to be applied to pole attachment complaint refunds or additional payments, the Commission uses the interest rate for Federal tax overpayments and underpayments. These rates are readily available, easily applied, and periodically revised to reflect changes in borrowing costs. The Commission takes official notice that the Commissioner of Internal Revenue changed the rates for the respective time periods as shown in the table below.* Accordingly, the Commission will apply the applicable interest rates for the periods reflected in the table until the payment of any ordered refunds or additional payments.

Effective Period	Over/Under Payment Rate	International Revenue Service Citation
1/1/89-3/31/89	10% 11%	Rev. Rul. 88-105, 1988-51 I.R.B. 4
10/1/88-12/31/88	10% 11%	Rev. Rul. 88-86, 1988-41 I.R.B. 1
7/1/88-9/30/88	9% 10%	Rev. Rul. 88-50, 1988-25 I.R.B. 39
4/1/88-6/30/88	9% 10%	Rev. Rul. 88-17, 1988-10 I.R.B. 6
1/1/88-3/31/88	10% 11%	Rev. Rul. 87-131, 1987-50 I.R.B. 6
10/1/87-12/31/87	9% 10%	Rev. Rul. 87-87, 1987-36 I.R.B. 8
7/1/87-9/30/87	8% 9%	Rev. Rul. 87-62, 1987-29 I.R.B. 10
4/1/87-6/30/87	8% 9%	Rev. Rul. 87-23, 1987-13 I.R.B. 46
1/1/87-3/31/87	8% 9%	Rev. Rul. 146, 1986-2 C.B. 208
7/1/86-12/31/86	9%	Rev. Rul. 59, 1986-1 C.B. 364
1/1/86-6/30/86	10%	Rev. Rul. 169, 1985-2 C.B. 337
7/1/85-12/31/85	11%	Rev. Rul. 47, 1985-1 C.B. 367
1/1/85-6/30/85	13%	Rev. Rul. 159, 1984-2 C.B. 311
7/1/84-12/31/84	11%	Rev. Rul. 66, 1984-1 C.B. 260
1/1/84-6/30/84	11%	Rev. Rul. 171, 1983-2 C.B. 252
7/1/83-12/31/83	11%	Rev. Rul. 76, 1983-1 C.B. 254
1/1/83-6/30/83	16%	Rev. Rul. 182, 1982-2 C.B. 339
2/1/82-12/31/82	20%	Rev. Rul. 260, 1981-2 C.B. 244
2/1/80-1/31/82	12%	Rev. Rul. 366, 1979-2 C.B. 402
2/1/78-1/31/80	6%	Rev. Rul. 411, 1977-2 C.B. 480

* In 1985, Congress approved a 1% differential between the interest rates for overpayments and underpayments. H. Rep. No. 426, 99th Cong., 2d Sess. at 849-50 (1985). The Commission will continue its past practice of using the overpayment interest rate for refunds, but will apply the underpayment rate for additional payments owed during the relevant periods. It will also continue to prescribe simple interest for pole attachment refunds. *See* Public Notice, Mimeo No. 4945 (June 15, 1983).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of
Depreciation pursuant to the Communications
Act of 1934, as amended for:

Cincinnati Bell Telephone Company
Citizens Utilities Company of California
Contel of California
Contel of New York, Incorporated
The Diamond State Telephone Company
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE North Incorporated
GTE Northwest Incorporated
Illinois Bell Telephone Company
Mountain States Telephone and Telegraph Company
Nevada Bell
New Jersey Bell Telephone Company
Pacific Bell
Pacific Northwest Bell Telephone Company

ERRATUM

Released: March 2, 1989

The *Order* released on January 25, 1989 (FCC 88-427) contained errors in the Appendix. The Appendix is corrected as follows:

1. Two of the Rate Category Descriptions on page 12 should be changed as follows:

From "2232 Digital Cir. Test. Equipment" to "2231 Radio Systems"

From "2232 Lightwave Circ. Equipment" to "2232 Circuit Equipment"

2. Footnote * on page 16 is changed to read: "As described in Paragraph 21 of the Order, the net service values for the Step-by-Step CDO Account and the Crossbar Account are to be amortized over a two year period ending December 31, 1990."

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NORTHEAST PENNSYLVANIA CELLULAR TELEPHONE COMPANY — File No. 00923-CL-MP-88

For a construction permit to modify DPCRTS Station KNKA338 operating on Frequency Block A at Northeast Pennsylvania MSA

Operating Authority of

NORTHEAST PENNSYLVANIA CELLULAR TELEPHONE COMPANY — File No. 01270-CL-L-88

For DPCRTS Station KNKA338 at Northeast Pennsylvania MSA

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1989; Released: March 2, 1989

By the Acting Chief, Mobile Services Division:

1. Northeast Pennsylvania Cellular Telephone Company (NEPACTC) is the non-wireline cellular licensee for the Northeast Pennsylvania Metropolitan Statistical Area (MSA). In April 1988, NEPACTC filed an application on FCC Form 401 for major modifications of its cellular system licensed as Station KNKA338 (File No. 00923-CL-MP-88). This application seeks to add one cell at Stroudsburg and one cell at Luzerne, Pennsylvania, to NEPACTC's existing cellular ststem. Northeast Pennsylvania SMSA Limited Partnership (NEPASLP), which is the wireline cellular licensee for the Northeast Pennsylvania MSA, filed a petition to dismiss or deny the foregoing application, claiming that the two proposed cells involve impermissible extensions of their 39 dbu contours beyond the boundaries of the Northeast Pennsylvania MSA. NEPACTC has filed an opposition to the foregoing petition and NEPASLP has filed a reply to that opposition.[1] Additionally, in May 1988, NEPACTC filed an FCC Form 489 (File No. 01270-CL-L-88) by which it notified the Commission that it was adding, as permissive changes pursuant to Section 22.9(d)(7)(ii) of the Commission's Rules, two cells at Stroudsburg and Luzerne which were smaller than those it had requested in its major modification application of April 1988 (File No. 00923-CL-MP-88). The foregoing Form 489 notification of permissive changes (File No. 01270-CL-L-88) was filed "as a temporary measure to permit the maximum permissible service pursuant to a minor modification" until the above-referenced major modification application (File No. 00923-CL-L-88) could be granted. NEPASLP filed an Emergency Petition for Cease and Desist Order (Emergency Petition) by which it requested that the Commission order NEPACTC to cease and desist what NEPASLP terms the unauthorized operations described in NEPACTC's May 1988 Form 489. NEPACTC has opposed NEPASLP's petition and NEPASLP has replied to NEPACTC'S opposition.

PERMISSIVE CHANGES

2. Before addressing NEPACTC's major modification application (File No. 00923-CL-MP-88), we shall discuss NEPACTC's more recent Form 489 request for permissive changes (File No. 01270-CL-L-88). In this regard, Section 22.9(d)(7)(ii) of the Commission's Rules provides that a cellular permittee may make certain minor modifications of its authorization without receiving prior Commission approval. A permittee need only notify the Commission of such "permissive" changes by filing an FCC Form 489, which is entitled "Notification of Status of Facilities Under Part 22 of FCC Rules." NEPASLP observes that Section 22.9(d)(7)(ii) allows such a permissive "change to or addition of a cell site as long as the composite 39 dbu contours remain totally within the cellular geographic service area [CGSA]." NEPACTC's May 1988 FCC Form 489 (File No. 01270-CL-L-88) informs the Commission that NEPACTC is adding two cells as permissive changes. Thus, NEPACTC is currently operating those two cells. In its Emergency Petition, NEPASLP notes that NEPACTC's foregoing FCC Form 489 filing informs the Commission that NEPACTC's Stroudsburg cell (Cell 6) extends 8.5 percent of its 39 dbu contour into the adjoining Allentown-Bethlehem-Easton, Pennsylvania/New Jersey MSA (Allentown MSA). NEPASLP argues that since NEPACTC is extending its 39 dbu contour beyond its authorized CGSA, it should have sought Commission approval by filing an application form (FCC Form 401) before operating in this matter. Further, NEPASLP contends, since NEPACTC has not received prior approval for this extension of its 39 dbu contour, it is operating illegally and should be ordered to cease this illegal operation.

3. In its opposition pleading, NEPACTC explains that the slight extension of its Stroudsburg cell's 39 dbu contour into the Allentown MSA is completely within the previously authorized contours of an existing neighboring cell (the "Camelback" cell) in NEPACTC's Northeast Pennsylvania cellular system. Thus, the composite 39 dbu contours of NEPACTC's authorized cellular system in the Northeast Pennsylvania MSA have not been changed. Moreover, NEPACTC notes, by approving the Camelback cell, the Commission necessarily determined that the relevant contour overlaps were *de minimis*. *See Cellular Application Filing Procedures -- An Update*, 52 Rad.Reg.2d (P&F) 725, 726 (Com.Carr.Bur. 1982), *aff'd., Cellular Radio Service*, 56 Rad.Reg.2d (P&F) 1583, 1587-88 at paragraph 13 (1984).

4. Ordinarily, a cellular licensee proposing to modify its cellular system to extend any 39 dbu contour outside of its presently authorized CGSA must first seek Commission approval by filing its request on FCC Form 401. Commission approval is required because such a modification is deemed to be a request for a change in the

licensee's CGSA. *See* Sections 903(d) and 22.9(a) of the Commission's Rules. Consistent with the referenced rules, Section 22.9(d)(7)(ii) does not allow a cellular licensee to make permissive changes by filing an FCC Form 489, if the contemplated modifications extend a 39 dbu contour beyond the presently authorized CGSA. Nevertheless, there are two exceptions to the foregoing rules. First, two licensees who have received Commission permission to combine their adjoining CGSAs do not need to file an FCC Form 401 to extend 39 dbu contours from one of the combined CGSAs into the other CGSA. Second, a licensee which has already received permission to extend its 39 dbu contours beyond its CGSA may extend another 39 dbu contour into an area which is completely encompassed by a previously authorized 39 dbu contour of the same cellular system without filing an FCC Form 401. A licensee falling under these exceptions must, of course, file a Form 489 informing the Commission of any relevant modifications to its cellular system. The two foregoing exceptions exist so that cellular licensees can make necessary minor changes to their systems in an expeditious manner and thus provide swift service to the public. In this light, since NEPACTC's current extension of its 39 dbu contour into the Allentown MSA is completely encompassed by the previously authorized contours of its Camelback cell, NEPACTC is operating legally.

MAJOR MODIFICATIONS

5. NEPASLP's petition to dismiss or deny asserts that NEPACTC's application (File No. 00923-CL-MP-88) for authority to make major modifications to cellular station KNKA338 by adding one cell at Stroudsburg (Cell 6) and one cell at Luzerne (Cell 7), Pennsylvania, should be rejected as defective because the 39 dbu contours of each cell extend impermissibly beyond the boundaries of the Northeast Pennsylvania MSA. Specifically, NEPASLP observes that about 55 percent of the area covered by the 39 dbu contour of the proposed Stroudsburg cell is located beyond the Northeast Pennsylvania MSA in the adjoining Allentown MSA. NEPACTC's application includes a letter from the Allentown Cellular Telephone Company (Allentown CTC), which is the non-wireline licensee of the Allentown MSA, stating that the licensee has no objection to the proposed Stroudsburg cell. The Commission's general policy is that extensions of a carrier's 39 dbu contours into an area not served by the applicant is prohibited--unless that extension is *de minimis*. *See Chicago SMSA Limited Partnership*, 61 Rad.Reg.2d (P&F) 58, 60 (Com.Carr.Bur. 1986). Nevertheless, an extension into an adjacent MSA will be permitted when the carrier requesting the extension receives permission from the corresponding carrier in the adjacent market and when the CGSA of the licensee in the adjacent MSA encompasses the extension area. *See Bell Atlantic Mobile Systems of Philadelphia (BAMS)*, 2 FCC Rcd 2d 7531 (Mob.Serv.Div. 1987).

6. NEPASLP argues that because a significant portion of the extension area in the Allentown MSA is not included within Allentown CTC's authorized CGSA, the licensee's consent is inadequate. In this light, NEPASLP contends, NEPACTC's entire 39 dbu contour extension area must be evaluated in the context of the Commission's requirement that extensions beyond MSA boundaries must be justified as *de minimis*. NEPASLP's arguments are without merit. About 91.8 percent of the area outside the Northeast Pennsylvania MSA which NEPACTC proposes to serve with its Stroudsburg cell is within the Allentown CTC's authorized CGSA. Thus, since NEPACTC has appropriate permission pursuant to *BAMS*, *supra*, to serve the foregoing area, the Commission's *de minimis* standards do not apply to that area. Nevertheless, the *de minimis* standards do apply to that area covered by the Stroudsburg cell's 39 dbu contour which lies within the Allentown MSA but outside Allentown CTC's CGSA. The foregoing area is about 36 square miles, which is only 8.2 percent of the area covered by the Stroudsburg cell's proposed 39 dbu contour and 1.5 percent of the area contained in the Northeast Pennsylvania MSA. In this light, NEPACTC has demonstrated that the area covered by its 39 dbu contour which lies within the Allentown MSA but outside the Allentown CGSA meets the Commission's *de minimis* standards. *See, e.g., Chicago SMSA Limited Partnership*, *supra*.

7. With regard to NEPACTC's proposed Luzerne cell (Cell 7), NEPASLP notes that the 39 dbu contour of that cell extends seven miles beyond the Northeast Pennsylvania MSA and encompasses approximately 14.5 percent (88 square miles) of the area to be covered by the proposed Luzerne cell. NEPASLP asserts that NEPACTC has not met the Commission's *de minimis* standards insofar as the foregoing extension area is concerned, noting, *inter alia*, that NEPACTC plans to use an omni-directional antenna and maximum effective radiated power, has made no attempt to reduce the overlap of its 39 dbu contour into the extension area, and has located its transmitter close to the Northeast Pennsylvania MSA border.

8. In determining whether a 39 dbu contour extension beyond MSA boundaries can be justified as *de minimis*, the Commission weighs the following factors as favoring the extension: (1) the proposed extension is intended primarily to serve the applicant's market; (2) the size of the extension area is small in relation to the size of the proposed service area; and (3) the extension is due to an irregular MSA boundary. *See*, e.g., *Chicago SMSA Limited Partnership*, *supra*, and *Metroplex Telephone Co.*, 2 FCC Rcd 7301 (Mob.Serv.Div. 1987).

9. In response to NEPASLP's arguments, NEPACTC observes that NEPASLP has already been granted a 39 dbu contour extension that encompasses the same extension area which NEPACTC has proposed to encompass with the 39 dbu contour of NEPACTC's Luzerne cell. On February 11, 1986, the Commission granted NEPASLP's application (File No. 29524-CL-MP-86) to increase the power of the Trucksville cell of its station KNKA326 in such a manner that the cell's 39 dbu contour would include the same basic extension area which NEPACTC now seeks to include within its own 39 dbu contour. Many of the reasons listed by NEPASLP in File No. 29524-CL-MP-86 which justify the relevant extension areas as *de minimis* are similar to those listed by NEPACTC in the instant proceeding. Thus, both applications state that the purpose of the extension is to provide better coverage within the Northeast Pennsylvania MSA, and not to provide service outside it; that the extension area is sparsely populated and that the irregular geographical terrain of the area to be served and the irregularly shaped MSA border justify the proposed cell design. Further, NEPACTC explains that the irregular and mountainous terrain of the area it seeks to serve requires the use of an omni-directional antenna to provide continuous and reliable cellular coverage within its Northeast Pennsylva-

nia MSA. Lastly, we observe that NEPACTC's proposed extension area is roughly 3.6 percent of the Northeast Pennsylvania MSA. In light of the foregoing, we find that NEPACTC has met the Commission's *de minimis* standards.

10. We find that NEPACTC is fully qualified to effectuate its proposals and that granting the instant application to make major modifications to cellular station KNKA338 would serve the public interest, convenience and necessity.

11. Accordingly, IT IS ORDERED that the application (File No. 00923-CL-MP-88) of Northeast Pennsylvania Cellular Telephone Company IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Northeast Pennsylvania MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dbu contours to eliminate any interference due to an extension.

12. IT IS FURTHER ORDERED that the petition to dismiss or deny and the Emergency Petition for Cease and Desist Order filed by Northeast Pennsylvania SMSA Limited Partnership ARE DENIED.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt, Acting Chief
Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] NEPASLP also filed a motion to strike NEPACTC's opposition pleading on the ground that the opposition did not contain a table of contents as required by Section 1.48(b) of the Commission's Rules. The foregoing rule section provides that pleadings which exceed 10 pages in length shall have a table of contents with page references. Although NEPACTC's pleading is 11 pages long, the eleventh page contains only a 15-word conclusion and a signature block. Further, NEPACTC has now provided an appropriate table of contents. In these circumstances, we find that the initial non-compliance of NEPACTC's opposition pleading with Section 1.48(b) of the Rules was inconsequential and, in any event, has been remedied by NEPACTC's subsequent filing of the table of contents.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Tulsa 23

For Renewal of License of Station KOKI-TV Tulsa, Oklahoma — File No. BRCT-880129KO

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1989; Released: March 2, 1989

BY THE COMMISSION: COMMISSIONER DENNIS CONCURRING AND ISSUING A SEPARATE STATEMENT

1. The Commission has before it for consideration: (i) a "Petition to Deny" filed May 2, 1988 by the National Black Media Coalition[1] and the Tulsa, Oklahoma branch of the NAACP (hereinafter NBMC/NAACP or petitioners) against the captioned license renewal application; (ii) an opposition pleading from the licensee; (iii) the petitioners' reply; and (iv) various related filings.[2] The petitioners allege that the licensee did not comply with the Commission's rule or policies concerning equal employment opportunity. Accordingly, the petitioners request that the Commission investigate the station's employment practices and, thereafter, designate the application for hearing.

2. *Procedural Matters*. The licensee contends that NBMC lacks standing to bring the petition pursuant to Section 309(d) of the Act and Section 73.3584 of the Commission's regulations. The licensee maintains that NBMC is not a party in interest because NBMC does not demonstrate a nexus between it or any of its members and the station and does not attempt to establish that the Tulsa branch of the NAACP is an NBMC member or otherwise affiliated with NBMC.

3. Section 309(d)(1) of the Act states that a petition must allege specific allegations of fact sufficient to show that the petitioner is a party in interest as supported by affidavits or statements under penalty of perjury. 47 U.S.C. Section 309(d)(1); *see also American Legal Foundation v. FCC*, 808 F.2d 84, 90-91 (D.C. Cir. 1987). Review of the statement submitted by Mr. Marshall for NBMC reveals that he is neither a viewer of nor resident within the challenged station's viewing area. Accordingly, we hold that NBMC is only an informal objector. The statement submitted by Ms. Johnson for the Tulsa branch of the NAACP, however, indicates that she is a viewer of KOKI. Thus, we hold that the NAACP is a petitioner.

4. *Pleadings*. NBMC/NAACP charge that the EEO program and employment profile of the challenged station reveal that the licensee did not comply with the Commission's EEO rule (Section 73.2080) or policies regarding blacks. [3] NBMC/NAACP allege that KOKI had no more than token employment of blacks during the license term and hired no blacks during the reporting year, that is, the year prior to submission of the renewal application. NBMC/NAACP maintain that the 1984-1988 statistical record is indistinguishable from the licensee's 1981-1983 record which the Commission found warranted reporting conditions. NBMC/NAACP also contend that the station failed to employ blacks in meaningful upper-level positions because no minority was employed above the level of technician during the term. By comparison, NBMC/NAACP note that the station employed a minority official and manager in 1981 and 1982. NBMC/NAACP further maintain that the licensee did not propose any new initiatives to improve its record. Alleging that the licensee is a recidivist that ignored its EEO obligations even while under the Commission's scrutiny,[4] NBMC/NAACP maintain that the Commission should initiate a thorough *Bilingual* [5] investigation and, thereafter, designate the renewal application for hearing.[6]

5. The licensee notes that the station "maintained its level of Black employees [the dominant minority] in compliance with the Commission's processing guidelines for the entire license period. . ." The licensee also states that the station employed minorities in addition to blacks during the license term and met the Commission's guidelines regarding employment of American Indians during the reporting year. Moreover, the licensee notes that EEO complaints have never been lodged against it. The licensee also argues that "the station has continued its affirmative recruitment efforts notwithstanding its satisfaction of the Commission's numerical processing guidelines with respect to Blacks." The licensee argues that its recruitment efforts resulted in blacks comprising 16.6% of the station's new hires for 1984-1985 and minorities comprising 25% of the 1985-1986 hires. Thus, the licensee states, its list of recent hires, upon which NBMC/NAACP focused, in and of itself proves nothing.

6. The licensee also contends that a severe depression in the oil industry adversely affected the Tulsa economy, resulting in a 20% decline in total television revenues and a 19% cut in KOKI-TV's full-time staff. The licensee adds that the station has maintained blacks on its staff "within the 50% of parity guideline despite substantial economic restraints in its overall ability to hire and maintain a workforce in keeping with the historical levels of employment at the station." Based on his analysis of the minority hiring experiences of other stations in Tulsa, the station's general manager asserts, without explanation, that the station's inability to hire even more minorities results in part from its lack of a news department. The licensee concludes that its EEO program and policies, the absence of discrimination complaints, and its adherence to Commission numerical guidelines warrant renewal without conditions.

7. In reply, NBMC/NAACP question the relevance of the licensee's statements about Tulsa's economy. They contend that there is no evidence that the economic decline affected recruitment of blacks differently from recruitment of whites. NBMC/NAACP also note that the licensee does not explain why the unemployment of oil personnel would adversely affect a television station's recruitment efforts or why the declining economy would prevent the licensee from notifying a meaningful number of minority recruitment sources whenever a job is open. Because of the station's failure to pursue an effective EEO program during the 1981-1983 license term, NBMC/NAACP argue that the licensee should provide evidence of its recruitment efforts listed in its EEO pro-

gram. NBMC/NAACP further contend that the station's lack of a news department resulting in no hiring opportunities for news positions does not affect the station's ability to hire minorities for other vacancies at the station. NBMC/NAACP conclude that the licensee's statements are irrational and pretextual arguments to avoid compliance with the Commission's EEO rule.

Discussion

8. Section 73.2080 of the Commission's rules requires that broadcast licensees refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates the licensee's efforts to implement its affirmative action program by reviewing all relevant and material information, including the composition of the station's workforce, the composition of the local labor force, the description of the station's EEO program and policies, recruitment and promotion data, and any EEO complaints filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations not meeting the Commission's internal processing guidelines.[7] The numbers and percentages are simply analytical aids, however, and are not determinative of a station's EEO compliance. As emphasized above, in the absence of evidence of discrimination, our primary concern is the broadcaster's EEO efforts. Thus, it is error for a broadcaster to assume, as apparently has been assumed by Tulsa 23, that it has reached a "safe harbor" once it meets the processing guidelines. When the evidence as a whole indicates that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose a forfeiture or prospective sanctions such as the submission of periodic progress reports, and/or grant renewal for less than a full term.[8] For less serious cases, the Commission may simply issue warnings.

9. The factual allegations of the petition, excluding NBMC/NAACP's inferences and conclusions, are derieved entirely from the station's EEO program and annual employment reports. Our review of these documents leads us to conclude that a prima facie case concerning noncompliance with our EEO rule by the licensee was raised.[9] However, after evaluating the station's EEO efforts in light of the opposition, the petitioners' arguments and the relevant labor force data for women and minorities, we find that no substantial and material questions of fact requiring a hearing are present. The EEO submissions of KOKI, however, indicate that the licensee did not fully comply with the Commission's EEO rules during the 1984-1988 license term. Accordingly, while we find no substantial and material questions of fact requiring a hearing, we will impose reporting conditions on the license renewal of KOKI so as to assure ourselves that these inadequacies do not continue.

10. By way of background, we imposed reporting conditions on KOKI-TV in 1984 because of the licensee's deficient EEO program during the license term preceding the one under consideration here. *Tulsa 23*, 55 RR 2d 1601 (1984). We noted that although the Tulsa workforce contained 12.6% minorities (6.4% black,[10] 1.3% Hispanic, 0.5% Asian or Pacific Islander and 4.4% American Indian),[11] the licensee hired no minorities during the 12 months prior to the submission of the 1984 renewal application (*i.e.*, the reporting year) and only three minorities during the license term. While encouraged by the licensee's recruitment efforts and promises to expand them, we concluded that additional monitoring of the licensee's recruitment practices was appropriate.

11. Thus, the Commission required the licensee to submit an updated EEO report for 1984 and progress reports for 1985 and 1986. The 1984 report indicated that the station was expanding its recruitment sources and stated that minorities applied for four of the station's 12 hiring opportunities during the year April 1, 1983 - April 1, 1984. As a result, the station hired for one of the 12 positions an American Indian, who apparently left the station's employ after several months and before being included in the station's statistics submitted in the May 1984 Annual Employment Report. The 1985 progress report indicates that minorities were in the applicant pool for nine of 12 hiring opportunities which resulted in the station hiring two blacks for technical positions. The 1985 Annual Employment Report, covering the payroll period ending March 1985, reflects one black in the technical category indicating that at least one if not both of the new black hires remained at the station less than one year. In 1986, the applicant pool for three of the 12 hiring opportunities included minorities which resulted in the hiring of three minorities, one each in sales, technical and professional positions.

12. Review of the progress reports submitted during 1984-1986 and the license renewal EEO program indicate that the licensee increased its list of referral sources from the previous license term to include, *inter alia*, American Women in Radio and Television, Tulsa County Vo-Tech, Tulsa Indian Youth Council, NAB Clearinghouse, Concentrated Employment Program, Minority Women Employment Service, and Tulsa Indian Emphasis Program. Additionally, the licensee increased the number of publications contacted to include two general circulation newspapers, the Tulsa World and the Tulsa Tribune, and the Oklahoma Eagle, a black publication. Based on this increase in referral sources, the inclusion of minorities in the applicant pool and the minority hires for the period 1984 to 1986 as noted in paragraph 10, *supra*, we conclude that the licensee's efforts for 1984 to 1986 generally were acceptable. Moreover, given these facts as well as the absence of any evidence of discriminatory placement of employees, we find that the licensee did not violate the nondiscrimination provision of our EEO rules. Further, we find that no *Bilingual* inquiry is required because there is no substantial statistical disparity between the minority component of the labor force and the minority presence at the station.

13. However, during 1987, the last year of the license term -- after the station was no longer under reporting conditions -- the licensee's EEO efforts evidenced a lack of productive minority recruitment sources, a lack of minority applicants, and a lack of minority hires. Specifically, the licensee failed to attract any potential minority candidates from either its general or minority referral sources and failed to include minorities in any of the applicant pools for the nine 1987 hiring opportunities, resulting in no minority hires during the reporting year. While it is certainly possible that a station's EEO efforts may not be entirely uniform from year-to-year throughout

a license term, we are particularly concerned here where there is an apparent lack of efforts during the last and only year when the station was no longer subject to reporting conditions. This concern is exacerbated because the licensee appears to have focused undue attention on whether its employment profile met the Commission's processing guidelines. As we indicated in our recent decisions addressing EEO concerns, meeting or exceeding the guidelines is not a "safe harbor" and neither exempts the licensee's program from review by the Commission nor permits it to slacken or cease its recruitment efforts. *See Broadcast EEO, supra* at 3974; *Florida Broadcast Renewals*, 3 FCC Rcd 1930, 1933 (1988). There is no reason for a licensee's vigorous efforts to diminish at 50%, 75% or even 90% of parity. Further, the licensee's explanation for not exerting greater EEO efforts, *i.e.*, the poor state of the economy and the lack of a news department are not pertinent. The station had nine hiring opportunities during 1987 and other hiring opportunities throughout the license term. There is no apparent reason to explain why minorities are unavailable for hiring opportunities in these situations when the licensee was able to attract and hire non-minorities for the available positions during the conditioned years. The licensee should seek qualified minority candidates for every hiring opportunity. Accordingly, to ensure that appropriate efforts are undertaken, we will impose conditions upon the licensee so that we can review fully at an early date its efforts to implement and conduct on-going self-evaluation of its program.[12]

14. Accordingly, IT IS ORDERED, That the petition to deny filed by the Tulsa branch of the NAACP and the informal objection filed by the National Black Media Coalition NAACP IS DENIED.

15. IT IS FURTHER ORDERED, That the license renewal application for Station KOKI-TV IS GRANTED subject to the EEO conditions specified herein.

16. IT IS FURTHER ORDERED, That the licensee of KOKI-TV file an original and one copy of the following on August 1, 1989 and February 1, 1991:

(a) For the August 1, 1989 report, a list of all job vacancies during the twelve months preceding July 1, 1989, and for the February 1, 1991 report, a list covering the period July 1, 1989 to January 1, 1991, indicating the job title and full or part-time status of the position, the race of national origin, sex and referral source of each applicant for each job and the race or national origin and sex of the person hired (such a list might start:

Job Title: D.J. (Part-time)

white female	A.W.R.T.
white male	newspaper
black male	Urban League
selected:	white female);

(b) a list of employees as of the July 1, 1989 payroll period for the first report and as of the January 1, 1991 payroll period for the second report, by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin;

(c) a narrative concerning the station's efforts to recruit for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment; and

(d) a narrative self-analysis of the station's efforts to promote and retain minorities, including rates of promotion and retention by sex and race or national origin, as well as any remedies employed to address deficiencies in EEO efforts.

17. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested - one copy of this Memorandum Opinion and Order to each of the parties to this proceeding.[13]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of Black organizations and persons seeking additional Black employment, program service and ownership in the media. The petition was filed jointly by NBMC and the Tulsa, Oklahoma Branch of the National Association for the Advancement of Colored People (NAACP).

[2] NBMC/NAACP submitted statements under penalty of perjury from the following: Pluria Marshall, who is Chairman of NBMC and a resident of Silver Spring, Maryland; and Maxine Johnson, President of the Tulsa branch of the NAACP and a viewer of KOKI-TV. The licensee submitted a supplement to the opposition.

[3] The petitioners did not challenge the licensee's employment practices toward women, which we have examined and found adequate.

[4] *See* paras. 9-11, *infra*.

[5] *In Bilingual Bicultural Coalition on the Mass Media Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), the court indicated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raises a question as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination, which has to be resolved before license renewal is appropriate. The court left the manner of resolving the question to our discretion.

[6] While recognizing that under *Bilingual* a substantial statistical disparity is the trigger requiring the Commission to elicit additional information before granting a license renewal (*Bilingual, supra*, at 629-30), the petitioner maintains that even though that condition does not exist in the instant case, such an inquiry is appropriate because the station's statistical record is barely within the processing guidelines with no indication of reasonable improvement from the previous license term. Moreover, NBMC/NAACP contend that the zone of reasonableness is expected to contract over time.

[7] In *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), we stated that all EEO programs would henceforth be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[8] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *Id.*

[9] Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(d)(1). *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

[10] The preliminary statistical analysis results from a comparison of the percentage of all minorities on the station's staff with the percentage of all minorities in the relevant labor force. *Michael Mathiesen*, FCC 83-127, 53 RR 2d 997, 1002 (1983); *Storz Broadcasting Co.*, 88 FCC 2d 641, 642 (1981). However, blacks are the largest minority group in the Tulsa labor force. Because of this circumstance and because their treatment is the focus of the petition to deny, our principal concern is with the station's efforts with respect to blacks. *Bilingual, supra; Metroplex Communications of Florida, Inc.*,96 FCC 2d 1090 (1984). Of course, we also examine the licensee's EEO submissions to assure ourselves that appropriate affirmative efforts were made with respect to all minority group members. *Bilingual, supra* at 625 n. 7. Here, *e.g.*, the licensee's minority recruitment efforts resulted in the station hiring two American Indians during the three conditioned years.

[11] The labor data was obtained from the EEOC Office of Program Research "1980 Census Data Report."

[12] Upon submission of the second report the Commission will review the licensee's EEO performance. If we determine that the licensee has developed and maintained an effective EEO program, no further reports will be required. If, however, the reports indicate that the licensee did not comply with our order by failing to maintain an EEO program, assess its program and modify its program based on this self-assessment, we will impose appropriate prospective sanctions such as continuation of the periodic progress reports, a forfeiture, a revocation of license or calling for renewal of the license prior to the end of the license term. *See e.g., Leflore Broadcasting*, 36 FCC 2d 101 (1972) (licensee required to file for renewal of license prior to its normal submission in lieu of the commencement of a revocation proceeding).

[13] The licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division for information of the preparation of employment reports at (202) 632-7069. In this regard, we advise the licensee that it need not submit the names of the persons referenced in its report; the information requested will suffice.

CONCURRENCE OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Application of Tulsa 23; For Renewal of License of Station KOKI-TV, Tulsa, Oklahoma

I agree with the majority that KOKI-TV's conduct warrants a sanction. I do not agree that a reporting requirement fits the circumstances. The majority recognizes KOKI-TV's EEO efforts did not meet Comission requirements during the last year of of its license term. KOKI-TV's conduct followed on the heels of exacly the same remedy as the majority now imposes. To reimpose a reporting sanction does little to impress upon the licensee the seriousness of its failure to comply with its EEO obligations. In employment law, progressive discipline is a well-established, time-tested approach for ensuring a corrective change in an employee's behavior. The progressive discipline concept is equally applicable to broadcasters. KOKI-TV did not learn its lesson after reporting conditions were first imposed -- a more serious sanction is now in order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. I-T-C-86-103

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, to extend its existing satellite services to points in the U.S. and the Caribbean.

RCA AMERICAN COMMUNICATIONS, INC. — File No. I-T-C-85-147

For authority pursuant to Section 214 of the Communications Act to provide satellite services between the United States and certain specified Caribbean and Latin American locations.

WESTERN UNION TELEGRAPH COMPANY — File No. I-T-C-83-136

For authority pursuant to Section 214 of the Communications Act to utilize Westar satellite capacity for communication between various points in the United States and points in Mexico, Costa Rica, Haiti, Dominican Republic, and Belize.

WESTERN UNION TELEGRAPH COMPANY — File No. I-T-C-83-139

For authority pursuant to Section 214 of the Communications Act to utilize Westar satellite capacity for communication between various points in the United States and points in the Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Jamaica, and St. Kitts-Nevis.

WESTERN UNION TELEGRAPH COMPANY — File No. I-T-C-86-104

For authority pursuant to Section 214 of the Communications Act to use Westar satellite capacity for data communication between the United States and the Bahamas.

RAINBOW NETWORK COMMUNICATIONS — File No. I-T-C-85-092

Application for authority pursuant to Section 214 of the Communications Act to offer common carrier satellite lines of communication between earth stations in the United States and in the Caribbean via the RCA Satcom, Hughes, GTE, Western Union Westar, and SBS Systems.

RAINBOW NETWORK COMMUNICATIONS — File No. 889-DSE-ML-85

Application for modification of its license for a fixed transmit/receive satellite earth station (WL94) at Belmont, New York to permit communications with the Satcom, Hughes, GTE, Westar and SBS systems for service between the Unites States and Caribbean locations.

SOUTH STAR COMMUNICATIONS, INC. — File No. I-T-C-86-089

Application for authority pursuant to Section 214 of the Communications Act to extend existing services to transborder locations.

SOUTH STAR COMMUNICATIONS, INC. — File No. 1140-DSE-ML-86

Application for modification of its domestic license for a fixed satellite earth station (E8846) at Davie, Florida, to permit communications with the Canadian ANIK satellite series.

John Michael Garner, d/b/a TELE-LINK, INC. — File No. I-T-C-86-129

For authority pursuant to Section 214 of the Communications Act to extend domestic satellite communications service to transborder locations.

E. Vernon Oliver and
John Michael Garner File No. I-T-C-86-130
d/b/a TELE-LINK, INC.

For authority pursuant to Section
214 of the Communications Act
to extend domestic satellite
communications service to transborder
locations.

RCA File No. I-T-C-87-040
AMERICAN
COMMUNICATIONS,
INC.

For authority pursuant to Section
214 of the Communications Act of
1934, as amended, to make available
television channels of communication
via the RCA Americom satellite Satcom K-2
for occasional service from various
points in the Caribbean and Central
America to the United States.

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1989; Released: March 2, 1989

By the Commission:

1. The Commission has before it an Application for Review filed by the Communication Satellite Corporation (Comsat) and a Petition for Reconsideration filed by Pan American Satellite (PAS) requesting clarification and reexamination of the Common Carrier Bureau's (Bureau) conditional authorization for the provision of two-way and occasional transborder satellite services between the United States and Latin America and Caribbean transborder locations.[1] GTE Spacenet Corporation (GTE), RCA American Communications, Inc., (RCA Americom) and Western Union Telegraph Company (Western Union) filed oppositions to the Comsat and PAS pleadings. PAS filed comments in response. As set forth herein, we grant the Comsat Application for Review in part and deny the PAS petition.

BACKGROUND

2. In 1981, following consultations with the Department of State, we granted initial approval for the use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. We determined in our *Transborder I* decision[2] that use of domestic satellite facilities for public international telecommunications with nearby countries would be in the public interest where INTELSAT is incapable of providing the proposed service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that service. [3] These standards were based on an Executive Branch determination that was necessitated by several applications to use domestic satellites to provide public international telecommunications to non-U.S. points within the footprints of those satellites.[4] Applying the Buckley letter standards, we have authorized over 200 applications on a conditional or final basis since 1981.[5] These authorizations involve video, audio, data and business services[6] offered on a one-way or two-way basis. One-way, receive-only services are those that are already carried over a U.S. domestic satellite system and can be received on a peripheral or incidental basis in a transborder location with the addition of a small, receive-only earth station. Two-way services are those that can originate in the U.S. or another transborder location for reception in the U.S. Two-way services may or may not involve the extension of an existing domestic network. To date, two-way transborder services have been finally authorized for U.S.-Canada and U.S.-Mexico service. All other transborder services currently consulted under Article XIV(d) of the INTELSAT Agreement fall into the one-way, receive-only category.[7]

3. In *Transborder XIII* the Bureau had before it applications which requested broad authority involving every category of transborder service previously considered. In considering these applications, the Bureau granted final authority for two-way transborder services to Canada and Mexico since service to these points has traditionally been provided by well-developed terrestrial systems and not by INTELSAT.[8] With respect to two-way services to points other than Canada and Mexico, the Bureau granted conditional authorization to several applications for video, audio and business services between points in the United States and Latin America and the Caribbean.[9] Although it appeared that INTELSAT could provide these services, the Bureau concluded that use of the INTELSAT system would be impractical and uneconomical. For the most part, the Bureau's findings applied to two-way services where an existing domestic network is in place and would be extended to transborder locations. When extending these networks to additional points, the Bureau concluded that it would be more cost efficient for these entities to utilize their existing satellite networks than to acquire space segment from INTELSAT. The Bureau found that in most cases, these Latin American and Caribbean locations could easily access domestic networks with the addition of a transmit/receive earth station. In comparison, duplication of the network via the INTELSAT system would involve payment of space segment and terrestrial circuit charges not associated with the use of an existing domestic communications network. Furthermore, the Bureau concluded that the use of domestic satellites for two-way transborder services would not cause significant economic harm to INTELSAT. Comsat and PAS filed the instant petitions challenging the Bureau's analysis and conclusions.

POSITIONS OF THE PARTIES

4. In its Application for Review, Comsat claims that the Bureau failed to apply properly the criteria set forth in the Buckley letter to the applications for two-way and occasional transborder services. Comsat argues that the applicants in question have not carried their burden of demonstrating that INTELSAT cannot practically or economically provide the service. It believes that proposals for two-way services should be subject to special Commission scrutiny since they are, by definition, neither peripheral nor incidental to the operation of preexisting

domestic networks. Thus, Comsat proposes that the Commission include in each transborder authorization the stipulation that the operator may use domestic satellites to provide international services only where it has been found that INTELSAT cannot provide the service. In the alternative, Comsat suggests that the Commission treat transborder and separate system applicants similarly, by requiring that all transborder proposals comply with the separate system restrictions.[10]

5. PAS requests reconsideration of *Transborder XIII* in order to clarify whether the Commission intended to restrict transborder applicants to the provision of services which are incidental to or a by-product of an existing domestic satellite network. Without this limitation, PAS believes that the applicants will attempt to use domestic satellites for the transmission of purely international services, *i.e.*, satellite transmissions which are not connected to an existing domestic satellite network. PAS asserts that our decision in *Jamaica Teleport* [11] could be construed as allowing communications unrelated to the existence of domestic satellite networks. As an authorized separate systems provider,[12] PAS is concerned that the transborder operators will have an unfair advantage in the Caribbean/Latin American region since, unlike separate systems, they are free to interconnect their services with the public switched network and offer occasional or short-term services on a common carrier basis.[13] In order to eliminate this perceived inequity, PAS requests that the Commission lift the service restrictions on separate systems.

6. GTE asserts that *Transborder XIII* is consistent with the Buckley letter criteria, past transborder decisions and U.S. policy. GTE believes that it is unnecessary to subject transborder services to the separate systems procedures and restrictions. Should the Commission decide to reconsider the separate systems restrictions, GTE argues that the applications authorized in *Transborder XIII* should not be deferred pending a determination on the matter.

7. In its opposition to the Comsat and PAS pleadings, RCA Americom asserts that nothing in the Buckley letter or the Commission's transborder orders explicitly places any geographic limitations on two-way transborder services. RCA Americom claims that its applications, File Nos. I-T-C-87-040 and I-T-C-85-147, satisfy all transborder criteria. RCA Americom accuses PAS of trying to obtain reconsideration of the *Separate Systems* decision out of time and, as a result, defer final authorization of two-way transborder services.

8. Western Union disagrees with the contention that applications proposing two-way services should either receive heightened Commission scrutiny or be subject to the separate systems criteria. It believes that the order is consistent with other actions taken in this area. Western Union notes that the applications given conditional approval in *Transborder XIII* resemble the U.S.-Canadian and U.S.-Mexican services authorized in previous transborder decisions.

DISCUSSION

9. Comsat's Application for Review and PAS' Petition for Reconsideration raise questions about the permissible scope of two-way service transborder authorizations to Latin American/Caribbean locations under the Buckley letter standards. After consideration of the arguments raised in these pleadings, we grant the Comsat Application for Review in part and deny the PAS petition. Furthermore, we conclude that with the exception of RCA Americom's application File No. I-T-C-87-040, the applications do not satisfy the criteria set forth in the Buckley letter.

10. In deciding to grant in part Comsat's Application for Review, we must recognize the recent decision of the United States Court of Appeals in *Jamaica Teleport II*. The decision represents the first Court review of the Commission's application of the Buckley letter standards and came after the Bureau's action granting the subject applications. Also, the services considered by the Court are similar to what is before us here.

11. In its decision, the Court vacated our authorization for the American Satellite Company (now Contel ASC) and Teleport International, Inc., to provide two-way business communication services between the U.S. and Jamaica using the ASC domestic satellite system. The Court found that although the application was properly considered under the Transborder satellite policy, the Commission had not correctly determined that the authorization was justified under the criteria set forth in the Buckley letter. Specifically, the Court found that our determination that use of INTELSAT by the applicant would be uneconomical and impractical was flawed. The Court emphasized that the Buckley letter places the burden on the applicant to show that INTELSAT service would be uneconomical or impractical. It questioned whether a finding of "uneconomical" could be made solely on the basis of a cost comparison with domestic services and remanded this issue to the Commission for further consideration. The Court did note, however, that the "uneconomical or impractical" requirement of the Buckley letter could be satisfied by a showing that "the INTELSAT system could not provide the service in question in its entirety and without duplication of facilities, and that the domestic satellite system could more nearly do so."[14] The Court viewed the record as inadequate for making this determination.

12. Upon review of the two-way applications conditionally authorized by the Bureau we find that, with one exception, the applicants have failed to meet their burden by providing sufficient information for the Commission to find that the Buckley letter standards have been satisfied. For the most part, the applicants request authority to provide a wide variety of two-way services without focusing on specific services and showing how use of INTELSAT would be uneconomical or impractical. This standard is most easily satisfied in those cases where existing services or networks are in place. For services that involve merely the extension of an existing domestic network to a transborder location, the "uneconomical or impractical" standard could be met by showing that use of INTELSAT would: 1) involve multiple satellite hops; 2) use additional terrestrial facilities; and 3) result in an inefficient use of the available radio spectrum.

13. We recognize that applications for two-way services may involve circumstances in which existing services or networks are not already in place making a finding of uneconomical and impractical more difficult. In such cases the burden is clearly on the applicant to provide the Commission information sufficient to make the required findings under the Buckley letter standards. The subject applications all fail to provide sufficient information except for RCA Americom's application File No. I-T-C-87-040. The applications do not specify whether the

proposed two-way services would extend an existing network or whether they involve establishment of communications that do not involve extension of existing networks[15] such as point-to-point transmissions. The chief justification given by the applicants for the two-way services is the general contention that no additional expenditures would be required, because domestic facilities are in place, and as a result, use of a domestic satellite would be more economical than service provided by INTELSAT. This contention is inadequate. The applicants fail to identify the types of services to be provided except in the most broad, general terms. They provide no cost information for purposes of comparison with INTELSAT prices. Moreover, assuming, *arguendo*, that comparative price data alone is insufficient to base a finding of uneconomical or impractical,[16] the applicants fail to provide information that demonstrates that the INTELSAT system could not provide the proposed services in their entirety and without duplication of facilities, and that the domestic satellite systems involved could more nearly do so. Accordingly, with the exception of RCA Americom's application File No. I-T-C-87-040, we remand the subject applications for two-way business and video services to the Bureau for further action consistent with our findings herein. The Bureau is directed to request such further information as may be necessary to determine the precise nature of the services to be provided and whether the proposed services meet the Buckley criteria.

14. We find that RCA Americom's application File No. I-T-C-87-040 sets forth detailed reasons why use of a domestic satellite for its proposed occasional two-way video services satisfies the Buckley letter criteria. RCA Americom states in its application that although INTELSAT can provide the proposed service, it cannot obtain terrestrial links to the nearest INTELSAT earth station. RCA Americom notes that it is often impossible for its client, NBC, to broadcast news events in remote locations or areas disrupted by natural disasters, where the establishment of terrestrial links to INTELSAT earth stations is impossible. It argues that use of a transportable earth station at the site of an event to transmit to the Satcom K-2 satellite would obviate these problems. Even where terrestrial facilities do not present a problem, RCA Americom states that it is often difficult to obtain scarce INTELSAT occasional-use video capacity. Finally, RCA Americom notes that since only a few of NBC's affiliates may want to carry a particular foreign event, it makes sense to transmit directly to those affiliates while remaining affiliates view regular NBC programming. According to RCA Americom, use of INTELSAT would be costly and inefficient since each affiliate would need an INTELSAT earth station or a terrestrial link to the nearest INTELSAT earth station as well as an earth station pointed at Satcom K-2 domestic satellite. In light of these circumstances, we conclude that RCA Americom has established that use of INTELSAT for NBC's occasional-use video service would be uneconomical and impractical. Essentially, NBC proposes point-to-multipoint transmissions via an existing domestic satellite network. We conclude, as in previous cases involving the extension of established domestic networks, that under these circumstances use of INTELSAT would be both clearly uneconomical and impractical.

15. We also disagree with the related arguments raised by Comsat and PAS that would limit the scope of transborder services to the extension of existing domestic networks. Comsat argues that two-way services, by definition, do not involve operation incidental to an existing domestic network, the implication being that all transborder services must involve the extension of a pre-existing domestic network. PAS as a policy matter, argues that the Bureau's order should be limited to transmissions incidental to or a by-product of an existing domestic satellite network. There is no basis for either assertion. As noted above with respect to two-way transborder services, where an integrated domestic network is involved, we have consistently found that the use of the INTELSAT system for such services is not only uneconomical, but impractical and undesirable. For example, in considering an application to use the SBS network for businesses desiring to add Canadian business locations to the network, we held that use of INTELSAT would be:

> Operationally, . . . very impractical considering that the SBS domestic system is entirely capable of providing service directly between the U.S. and Canadian customer premises without multi-satellite or terrestrial links. Maximum efficiency is gained through the use of one satellite to link a customer's numerous business locations simultaneously. Therefore, a customer's service requirements can only be met, economically and efficiently, through the use of one satellite for one fully integrated network. Consequently, the use of INTELSAT facilities for the extension of these domestic networks to various Canadian locations would diminish the value of SBS's service offering.[17]

Contrary to Comsat's assertion, the above language clearly indicates that two-way services can involve the extension of an existing domestic network. Moreover, it was never our intention to restrict transborder services in the manner suggested by Comsat and PAS. Our Transborder policy involves service incidental to the natural footprint of the satellite. Thus, within the natural footprint of a domestic satellite a full range of transborder services is possible. The fact that prior applicants have been able to satisfy the Buckley letter criteria by showing that it would be uneconomical and impractical for them to use the INTELSAT system to provide service to new points where an existing domestic communications network is in place, does not make the existence of such a network a prerequisite to obtaining Commission approval of a transborder application.

16. Furthermore, there is no basis in either the Buckley letter or any other aspect of our Transborder policy for Comsat's suggestion that any authorization include the condition that the "only international service to be provided via domsats is that which INTELSAT has been found to be unable to provide."[18] Such a condition is contrary to the plain language of the Buckley letter, which permits the use of domestic satellites not only where INTELSAT cannot provide the service, but where it would be clearly uneconomical and impractical to use INTELSAT for the service.

17. As a final matter, Comsat and PAS question whether we should continue to hold transborder and separate systems services to two different operational standards. However, any change in overall U.S. international satellite policy cannot be made within the narrow context of this proceeding and must involve other U.S. government agencies. Absent any change, the applications before us fit

squarely within the transborder category and will be treated accordingly. In *Jamaica Teleport II*, the court noted that Congress had distinguished separate systems and transborder services in the 1986-87 Foreign Relations Authorization Act (FRAA).[19] The court explained that in the definitional section of the FRAA, Congress

> defined 'separate system' so as to exclude the kind of proposals the Commission had considered under its transborder policy. The term 'separate system,' it stated, 'shall not include any satellite or system of satellites established - (1) primarily for domestic telecommunications purposes and which incidentally provides services on an ancillary basis to points outside the jurisdiction of the United States, but within the western hemisphere.'[20]

Furthermore, as a policy matter, the Commission has previously distinguished transborder policy from separate systems policy based on the fact that with transborder services: 1) the satellites involved are and have always been designed for domestic service; 2) the domestic satellite system is not designed to compete *directly* with INTELSAT; and 3) the applicants propose to serve only those locations that fall within the natural coverage area or footprint of a domestic satellite. All of the applications considered in *Transborder XIII* possessed these characteristics.

18. Accordingly, IT IS ORDERED that the Application for Review filed by the Communication Satellite Corporation IS GRANTED in part and the applications of GTE Spacenet (File No. I-T-C-86-103), RCA American Communications (File No. I-T-C-85-147), Western Union Telegraph Company (File Nos. I-T-C-83-136, I-T-C-83-139 and I-T-C-86-104), Rainbow Network Communications (File Nos. I-T-C-85-092 and 889-DSE-ML-85), Tele-Link (File Nos. I-T-C-86-129 and I-T-C-86-130) and South Star Communications, Inc. (File Nos. I-T-C-86-089 and 1140-DSE-ML-86) to provide two-way service to points other than Canada and Mexico ARE HEREBY REMANDED to the Bureau for further action consistent with our findings herein.

19. IT IS FURTHER ORDERED that the final authorization of two-way services to Canada and Mexico for Rainbow, Tele-Link and RCA Americom (File No. I-T-C-87-040) IS AFFIRMED.

20. IT IS FURTHER ORDERED that the conditional authorization for RCA American Communications Corporation, File No. I-T-C-87-040, to provide two-way services to Latin American/Caribbean locations IS AFFIRMED.

21. IT IS FURTHER ORDERED that the final authorization for RCA Americom (File No. I-T-C-85-147) IS AFFIRMED with respect to one-way, receive-only services previously consulted under Article XIV(d) of the INTELSAT Agreement.

22. IT IS FURTHER ORDERED that the Bureau is authorized to request further information in connection with the remanded applications to determine the precise services sought to be provided and whether the services comply within the Buckley letter standards.

23. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Pan American Satellite Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Attachment I

Western Union Telegraph Company, File Nos. I-T-C-83-136 and I-T-C-83-139 (Western Union). These applications initially requested authority to use Westar System for all forms of communication including leased transponder service, point-to-point and point-to-multipoint transmission of cable systems and broadcast stations, teleconferencing and private line voice, record, data and image communications, between the U.S. and certain Latin American/Caribbean locations. These applications were later bifurcated to permit action on the receive-only services portion for which Western Union had an immediate need and for which the INTELSAT Article XIV(d) consultation process has been completed. With respect to the two-way services portions of the applications, Western Union offered no justification as to why authorization of the services requested would satisfy the Buckley criteria.

RCA American Communications, File No. I-T-C-85-147 (RCA). This application requests authority to provide leased channel services, television services (including occasional and fixed term service), audio services, transponder services, off-shore and remote channel services and digital data services between the U.S. and specified Caribbean, Central and South American countries. In support of its request, RCA states that no additional construction, lease or purchase of facilities or equipment would be required since the requisite facilities are already in place. Thus, RCA argues that it makes operational and economic sense for RCA to provide these services. RCA acknowledges that service, on a limited basis, is provided via INTELSAT between the U.S. and most of the listed countries. However, RCA states that such service is not as comprehensive as its proposed service. Since its service will not require additional expenditures, RCA notes that its service will be more economic than service via INTELSAT.

Rainbow Network Communications, File Nos. I-T-C-85-092 and 889-DSE-ML-85 (RNC). These applications request authority for RNC video, point-to-point and point-to-multipoint video teleconferencing, data and leased channel services between the United States and Caribbean locations. RNC states that the provision of lines of communication would not involve any construction of facilities or the significant expenditure of funds. In support of its application, RNC states only that its application is consistent with previous Commission authorizations of transborder service.

Tele - Link, Inc., File Nos. I-T-C-86-129 and I-T-C-86-130. Tele-Link proposes to use its existing common carrier earth station and related facilities with the Canadian ANIK and Morelos satellite systems and all domestic satellite systems consulted under Article XIV(d) of the INTELSAT Agreement to extend its services for the transmission and reception of television programming originated from or received at points in Canada, the

Caribbean, and Central and South America. In support of its application, Tele-Link states only that grant of its application will permit it to offer more flexible service to existing customers and that no significant additional costs are anticipated.

GTE Spacenet Corp. File No. I-T-C-86-103. GTE requests authority to provide a variety of domestic satellite services, including full transponder service, occasional use transponder service and partial transponder service, in addition to the receive-only t.v., audio and receive-only services previously consulted under Article XIV(d) of the INTELSAT Agreement.[21] GTE notes that the proposed operations will not require the construction, leasing purchasing of facilities, or any additional expense to it. GTE relies on previous Commission precedent without demonstrating how its services satisfy the impractical and uneconomical standards of the Buckley letter.

Western Union. File No. I-T-C-86-104. Western Union proposes to provide two-way business services between Miami, Florida and Nassau, Bahamas. Western Union states that service would be uneconomical and impractical since use of INTELSAT would involve the expense of INTELSAT space segment and the cost of hauling data between the customer's office in Miami and approximately one hundred miles to the nearest INTELSAT C-band earth station. Western Union argues that when a Westar satellite is used, the transmissions can be transmitted directly from the customer premises earth stations to the satellite, thereby avoiding the expense of relay to and transiting of the INTELSAT system earth stations.

RCA American Communications, Inc., File No. I-T-C-87-040. RCA Americom requests authority on behalf of the National Broadcasting Company, Inc. (NBC) to transmit occasional video programming such as news feeds, live sports events and special events over the RCA Americom K-2 domestic satellite between the U.S. and specified transborder locations. RCA Americom argues that such occasional use by NBC to cover fast-breaking news stories, live events and other special events is in the public interest.

RCA Americom claims that NBC has often had to use a variety of cumbersome methods to cover such stories. RCA Americom states that at times it has been difficult, if not impossible to obtain INTELSAT capacity to meet its needs. RCA Americom notes further that it is complicated and expensive to obtain terrestrial links between the earth station and event being covered. In many locations in the Caribbean, RCA Americom argues that no such links are possible and film must be flown to the nearest INTELSAT earth station for retransmission. RCA Americom notes that use of K-2 would give NBC total flexibility instead of seeking scarce INTELSAT occasional-use t.v. capacity. RCA Americom also notes that use of K-2 would allow the use of small, mobile earth stations for Ku-band transmission, permitting broadcast within K-2's footprint of news events from remote locations or areas disrupted by natural disasters which make it impossible to establish landlines to the nearest INTELSAT earth station. RCA Americom states that the flexibility afforded by use of K-2 would be especially useful for sports events, because only one or a few NBC affiliates may want to carry a particular live foreign sports event. RCA Americom asserts that in such cases it makes sense to transmit directly from the site of the event to those affiliates, while the remaining domestic affiliates and foreign receive point view regular NBC programming. According to RCA Americom, use of INTELSAT would be costly and inefficient since each of the NBC affiliates taking a foreign event would have to have an INTELSAT earth station or a terrestrial link to the nearest INTELSAT earth station, as well as an earth station pointed at K-2.

FOOTNOTES

[1] GTE Spacenet *et al.*, 2 FCC Rcd 2477 (1987) (Transborder XIII).

[2] Transborder Satellite Video Services, 88 F.C.C. 2d 258 (1981) (hereinafter Transborder I).

[3] *See* Transborder I, *supra* note 1. *See also* American Satellite Co., 88 F.C.C. 2d 178 (1981); Satellite Business Systems, 88 F.C.C. 2d 195 (1981).

[4] *See* Letter from Undersecretary of State James L. Buckley to FCC Chairman Mark S. Fowler, dated July 23, 1981, appended to Transborder I, *supra* note 2 (hereinafter Buckley letter).

[5] *See, e.g.*, Transborder I, *supra* note 2; Eastern Microwave, Inc., I-P-C-81-049 *et al.*, Mimeo No. 2617, released March 1, 1983 (Transborder II); American Telephone & Telegraph Company, File Nos. I-P-C-82-048 *et al.*, Mimeo No. 6119, released Aug. 26, 1983 (Transborder III); Bonneville Satellite Corp., *et al.*, File Nos. I-T-C-83-148 *et al.*, Mimeo No. 1554, released Dec. 29, 1983 (Transborder IV); Western Union Telegraph Co., *et al.*, File Nos. I-T-C-83-068 *et al.*, Mimeo No. 3286, released April 4, 1984 (Transborder V); Eastern Microwave, Inc. *et al.*, File Nos. I-T-C-84-095 *et al.*, Mimeo No. 6425, released Sept. 11, 1984 (Transborder VI); Western Union Telegraph Co., *et al.*, File Nos., I-T-C-83-136 *et al.*, Mimeo No. 3643, released April 8, 1985 (Transborder VII); American Satellite Company *et al.*, Mimeo No. 7299, released Sept. 30, 1985 (Transborder VIII); RCA American Communications, Inc., *et al.*, File Nos., I-T-C-86-002 *et al.*, Mimeo No. 2578, released Feb. 14, 1986 (Transborder IX); National Cable and Satellite Corp., *et al.*, File Nos. 417-DSE-ML-86 *et al.*, Mimeo No. 5220, released June 20, 1986 (Transborder X); American Telegraph & Telephone Company, *et al.*, 1 FCC Rcd 72 (1986) (Transborder XI); RCA American Communications, Inc., *et al.*, 2 FCC Rcd 1869 (1987) (Transborder XII); GTE Spacenet, *et al.*, 2 FCC Rcd 2477 (1987) (Transborder XIII).

[6] Transborder business services include, but are not limited to, data and electronic document distribution, video teleconferencing and private-line voice communications.

[7] As a party to the INTELSAT Agreement, the United States is required under Article XIV(d) to consult with INTELSAT prior to granting a party final authority to utilize space segment facilities separate from the INTELSAT system for the provision of international public telecommunications services. The consultation is designed to ensure that the use of non-INTELSAT facilities is technically compatible with planned INTELSAT space segment and to avoid significant economic harm to the INTELSAT global system.

[8] Only the Bureau's authorization of two-way services to points other than Canada and Mexico are considered herein.

[9] We have been notified that one of the applicants, South Star Communications, Inc., has filed for bankruptcy and is no longer operating. Letter dated May 19, 1987 from John F. Noble, Attorney for South Star, to Federal Communications Commission.

[10] Transborder applicants are not limited to the prohibition against interconnection with the public network imposed on separate systems applicants.

[11] Teleport International, Ltd., 1 FCC Rcd 101 (1986) (hereinafter Jamaica Teleport), *remanded* Communications Satellite Corp. v. F.C.C., 836 F.2d 623 (1988) (hereinafter Jamaica Teleport II).

[12] PAS has been granted final authority to construct and operate an international satellite system separate from INTELSAT. PAS plans to carry traffic between North America and Latin America and the Caribbean. *See* In the Matter of Establishment of Satellite Systems Providing International Communications (Separate Systems decision), 101 F.C.C. 2d 1046 (1985), on reconsideration FCC 86-144 (April 17, 1986) and FCC 86-471 (Nov. 5, 1986); Pan American Satellite, 2 FCC Rcd 2011 (1987).

[13] In the Separate Systems order, *supra* note 6, we restricted separate systems operators to the sale or long-term lease of transponders or space segment capacity not interconnected with the public switched network.

[14] Jamaica Teleport II, 836 F.2d at 635.

[15] As noted in paragraph 2 above, the two-way business occasional video and audio services authorized to date involving only Canada and Mexico were based on the fact that these services traditionally had been provided over well developed terrestrial networks and not INTELSAT. However, where service to non-contiguous locations is involved and INTELSAT can provide the service, satisfying the Buckley criteria is more difficult.

[16] Based on the lack of detailed justification required by the Buckley letter, it is not necessary for us to decide here the issue remanded by the Court in Jamaica Teleport II, *i.e.*, whether a finding that service via INTELSAT is uneconomical can be based solely on comparative price data.

[17] Satellite Business Systems, 88 F.C.C. 2d at 207.

[18] Comsat Application for Review, p. 4.

[19] Foreign Relations Authorization Act, Pub. L. No. 99-93, § 146 (1985).

[20] *See* Jamaica Teleport II, 836 F.2d at 627; Foreign Relations Authorization Act, § 146(g).

[21] GTE bifurcated this application to permit action on the one-way, receive-only portions. The one-way services requested were authorized in the Commission's Transborder XII decision. *See* n. 4 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 3, 1989

AT&T REQUESTS SPECIAL PERMISSION REGARDING PUBLICATION OF PROPOSED FTS 2000 RATES
Pleading Cycle Established

On January 24, 1989, AT&T Communications (AT&T) filed Transmittal NO. 1493, proposing rates, terms, and conditions for the Federal Telecommunications System 2000 (FTS 2000). With its filing, AT&T submitted two versions of proposed tariff pages containing the revisions, with the proposed rates deleted from one version (Redacted Version). AT&T also filed an application for special permission, requesting waiver of Sections 61.2, 61.54(j), and 61.72 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.54(j), 61.72, to the extent that those provisions of the Rules require AT&T to file on the public record and otherwise publish the FTS 2000 rates. AT&T proposes to file only the Redacted Version on the public record.[1] AT&T argues that public disclosure of the FTS 2000 rates would cause AT&T competitive harm, with no offsetting benefit.

Interested parties may file comments on AT&T's request for waiver of Sections 61.2, 61.54(j), and 61.72 of the Rules no later than **February 10, 1989.** Replies may be filed no later than **February 17, 1989.**

Copies of the AT&T waiver request may be obtained from the Commission's contract copier, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. A copy of this waiver request is also on file and available for public inspection in the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W. An original and five copies of all comments and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each comment and reply must be filed with ITS.

For further information, contact Pat McQuie Nagle, Tariff Division, (202) 632-6917.

FOOTNOTE

[1] Letter from W.E. Lind, Administrator Rates and Tariffs, AT&T, to Secretary, Federal Communications Commission, Application No. 511, Jan. 24, 1989. AT&T also indicates that it is requesting confidential treatment of the version of its filing containing the proposed rates (Unredacted Version). *See id.* at 2, n.*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JOHN McCUTCHEON d/b/a MCC COMMUNICATIONS (Assignor) File No. BAPCT-860801LL

and

J.D.G. TELEVISION, INC. (Assignee)

For Assignment of Construction Permit for Station KFAA(TV), Rogers, Arkansas

J.D.G. TELEVISION, INC. File No. BMPCT-860807KF

For Modification of Facilities of Station KFAA(TV), Rogers, Arkansas

J.D.G. TELEVISION, INC. File No. BMPCT-860807KE

For Modification of Facilities of Station KPOM-TV, Fort Smith, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1988; Released: March 2, 1989

By the Commission:

1. The Commission has before it for consideration: (1) the above-captioned application for consent to the assignment of the construction permit for unbuilt station KFAA(TV), channel 51, Rogers, Arkansas, from John McCutcheon d/b/a MCC Communications (MCC) to J.D.G. Television, Inc. (JDG); (2) the applications to modify both the authorized facilities of KFAA and the existing facilities of station KPOM-TV (NBC), channel 24, Fort Smith, Arkansas, which is licensed to JDG; (3) a petition to deny the assignment application filed by Tri-State Broadcasting Corporation (Tri-State), licensee of station KSNF(TV) (NBC), channel 16, Joplin, Missouri; and (4) related pleadings.[1]

2. As currently authorized (yet unbuilt), the proposed Grade B contour of KFAA would overlap more than 50 percent of the Grade B contour of operating station KPOM-TV. The Commission's "duopoly" rule, 47 C.F.R. Section 73.3555(a)(3), ordinarily prohibits the acquisition of stations with overlapping Grade B contours. However, JDG proposes to operate KFAA as a satellite of KPOM-TV and requests grant of the assignment application pursuant to Note 5 of Section 73.3555, which permits consideration of overlap questions involving satellite operations on a case-by-case basis to determine whether common ownership, operation or control of the subject stations would be in the public interest.

3. Shortly after tendering the assignment application, JDG filed additional applications to modify the existing facilities of KPOM-TV and those authorized for unbuilt station KFAA, which, among other things, will reduce the amount of predicted Grade B overlap between the two stations.[2] The existing Grade B contour of KPOM-TV encompasses an area of 6,016 square miles within which 376,560 people reside; as proposed, that contour would be reduced to an area of 5,648 square miles and 277,184 people. The authorized Grade B contour of KFAA would encompass an area of 7,952 square miles and 329,035 people; as proposed, the area within that contour would be reduced to 1,775 square miles within which 177,246 people reside. These figures represent an approximate decline of 6.1 percent of the area and 26.4 percent of the population within KPOM-TV's Grade B contour, and an approximate reduction of 77.7 percent of the area and 46.1 percent of the population within the Grade B contour of KFAA. Thus, if the modification applications are granted, the overlap area would encompass 221 square miles and 11,758 people which is 5.5 percent of the area and 4.2 percent of the population within KPOM-TV's Grade B contour; 12.5 percent of the area and 6.6 percent of the population within KFAA's Grade B contour; and 3.1 percent of the total area and 2.7 percent of the total population within the combined Grade B contours of the two stations.

4. In support of its proposal, JDG states that channel 51 was allocated to Rogers in 1984 as the result of a petition for Rule Making, and in 1985, MCC filed the only application for the channel, which was subsequently granted. It further asserts that MCC thereafter determined that construction and operation of KFAA as proposed was not feasible, and it entered into an agreement to assign the construction permit to JDG. JDG contends that MCC's proposed construction and operation of KFAA is economically unrealistic and, absent the requested waiver and modifications, the station is unlikely to be constructed. It observes that Rogers, a small community of 17,429, is located approximately 70 miles northeast of Fort Smith. Rogers is located at the periphery of the Joplin, Missouri-Pittsburg, Kansas, area of dominant influence (ADI) and is just outside of the Fort Smith, Arkansas, ADI (nationally ranked 119 and 149 respectively). JDG notes that KFAA, even as now authorized, would not provide coverage to the cities of Joplin and Fort Smith. Nevertheless, it observes that neither the Joplin nor the Fort Smith markets presently has an independent television station. Moreover, because of its size and distance from the larger cities of Joplin and Fort Smith, JDG argues that it is highly unlikely that Rogers could support an independent television station. Additionally, JDG argues that the uncertainty surrounding KFAA's ability to obtain cable carriage on the cable systems within its service area, where cable penetration is heavy, further diminishes the prospects for the establishment of KFAA as a viable independent station providing the first local television service to Rogers.

5. JDG contends that construction of the KFAA facility as presently authorized is impractical and a high financial risk, given the small size of the community of license and because the station's service area will overlap substantially with the service areas of the network affiliates serving the

Fort Smith and Joplin-Pittsburg markets. JDG notes that the capital necessary to construct the station became unavailable to MCC, in part because of the uncertainties over KFAA's ability to obtain cable carriage in the service area. As a satellite of KPOM-TV, JDG maintains, KFAA would provide Rogers and a substantial portion of Benton County, Arkansas, in which it is located, with its first NBC network service. It avers that an NBC affiliation would not be available to KFAA in the absence of the proposed satellite operation because of the overlap that would exist between KFAA and the other NBC affiliates in the area.

6. JDG argues that the small size of Rogers justifies the establishment of a satellite operation, noting that in such cases the Commission may approve such proposals without detailed financial showings. *See Meyer Broadcasting Co.*, 42 RR2d 339 (1978), and *Midcontinent Broadcasting Co. of Wisconsin*, 12 RR2d 763 (1968). Further, it asserts that the Commission has recognized that, in sparsely populated areas such as Rogers, satellites are often the only economic means of providing any off-the-air broadcast TV service or of providing multiple services of the major national TV networks. *See, Notice of Inquiry and Notice of Proposed Rule Making*, MM Docket No. 87-8, FCC 87-29, released March 2, 1987. In that regard, JDG believes that the service gains to be realized by its proposed operation outweigh the proposed reductions to the existing KPOM-TV and the authorized KFAA service areas. It submits that no "white" area will result and that it would actually provide new service to a "gray" area with 698 people in an area of 40.5 square miles.[3] Additionally, it states that as a result of its proposed operations, 12,676 people would gain a third television service, 35,315 people would gain at least a fifth television service and 29,963 people would gain a first NBC network service. Although JDG maintains that there would be no loss of a first or second television service, it acknowledges that 2,967 people in areas to the northeast and northwest of Fort Smith, who now receive three television services, would lose their only NBC network service. However, it contends that with the exception of the city of Huntsville, the loss areas are mostly comprised of sparsely populated rural areas, including large areas of national forest lands. JDG notes that the Huntsville cable system, which has 629 subscribers out of a potential 700, carries both KPOM-TV and KYTV(TV), Springfield, Missouri's NBC affiliate. In any event, JDG avers that its proposed channel 61 Huntsville translator will provide 74 dBu service to 94 percent of the predicted NBC network service loss area and to all but 20 of the 2,967 persons living within the predicted loss area. JDG states that, should channels be available, it intends to file applications to construct a television translator in any remaining loss areas.[4]

7. JDG also maintains that in addition to the public interest benefits with respect to KFAA, the proposed satellite relationship with KPOM-TV is essential to the parent station's ability to survive and to compete effectively with other network affiliated stations in the Fort Smith market. It states that KPOM-TV is presently unable to compete effectively due to inferior or nonexistent signal coverage to a significant portion of its market area which can be overcome with the proposed satellite operation. It claims that the satellite proposal will enable it to serve the population centers of Fayetteville, Springdale and Rogers, to the north of Fort Smith, whereas the mountainous terrain between Fort Smith and Fayetteville precludes effective service to those areas by a single UHF station.[5] It therefore argues that denial of the KFAA satellite operation will not only deprive Rogers of a local television outlet, but will also deprive the public of improved service and benefits that would result from enhanced competition by a stronger Fort Smith NBC affiliate. JDG states that even as a parent-satellite operation, the proposed combined KPOM-TV/KFAA Grade B service area would be 7,202 square miles with a population of 442,672. By contrast, JDG observes that KFSM-TV, channel 5 (CBS), Fort Smith, currently serves 604,380 people in its Grade B area of 14,572 square miles, and that KHBS(TV), channel 40 (ABC), Fort Smith, and its satellite KTVP(TV), channel 29 (ABC), Fayetteville, Arkansas currently serves 571,427 people in a combined Grade B service area of 13,812 square miles.[6] In any event, JDG asserts that the approval of the satellite operation as proposed will permit the existence of three strong network affiliates which will encourage diverse and high quality news and other programming. It states that although it has been operating KPOM-TV at a financial loss since acquiring it in 1986, it has engaged in a comprehensive program to improve KPOM-TV's technical facilities, programming and personnel. JDG notes that it has spent over750,000 in technical improvements alone. In addition, it states that if the subject applications are approved, it will be able to construct a full studio facility for KFAA at Rogers, establish a fully staffed news and operations department, and originate live local news from the KFAA studio daily. However, JDG states that without the benefit of the Rogers satellite, KPOM-TV will be unable to compete effectively in the market, resulting in continued financial losses which will require a reduction in expenditures for news and public affairs programming.

THE PETITION TO DENY

8. In its pleadings, Tri-State maintains that JDG's showing in support of its proposal fails to establish the economic necessity of the proposed satellite operation or that the acquisition of KFAA under these circumstances is necessary to assure the competitiveness of KPOM-TV. It states that JDG does not address adequately its proposal to operate KFAA as a satellite or even consider the possibility that the scaled down KFAA facility might be viable as an independent full-service station. As to JDG's concern that an independent full-service KFAA would not be assured of cable carriage, Tri-State asserts that such a factor, by itself, does not establish the need of a satellite operation, or justify a waiver of the Commission's Rules to permit signal overlap with KPOM-TV. Moreover, the petitioner asserts that JDG has not provided sufficient information to support its contention that the proposed satellite operation is necessary for the financial survival of KPOM-TV. For example, Tri-State states that the financial data submitted for KPOM-TV reveals that, although the station suffered losses during JDG's initial operations, those losses have been decreasing to the point that KPOM-TV is likely to be profitable in slightly more than three years. Further, it notes that the substantial capital improvements in KPOM-TV's facility and staff have increased the station's popularity and viewership, thus strengthening its ability to compete with other Fort Smith stations. Because it is based on the premise that the station will continue to suffer losses as in previous years, Tri-State therefore disputes JDG's assertion that reductions in programming and other operating expenditures

will be required at KPOM-TV if these applications are not granted. In any event, the petitioner contends that JDG's desire to make future improvements in KPOM-TV programming is not dependent on, or justification for, approval of the KFAA satellite operation.

9. Tri-State further alleges that JDG's proposal, if approved, will result in a substantial and significant curtailment of service from that presently authorized for KPOM-TV and KFAA. It asserts that the combined reduction of KPOM-TV's existing and KFAA's proposed signals will eliminate service to a total of 324,965 persons in 7,136 square miles and create a white area (elimination of a first service) of 2,016 persons in 93 square miles.[7] Moreover, Tri-States asserts that because JDG does not claim that KPOM-TV's current signal coverage of Fort Smith is deficient, its desire to increase the strength of the station's signal there is irrelevant to its request for waiver of Section 73.685(e) of the Commission's Rules to permit the use of a directional antenna with a maximum to minimum ratio of more than 15 dB. In fact, it states, the proposed operation of KPOM-TV with a directional antenna with a suppression of 34 dB can be expected to be beset with numerous design, manufacturing, testing and operational difficulties which are likely to produce the signal orientation problems which Section 73.685(e) is meant to prevent. Tri-State maintains that JDG has not demonstrated that operation of the proposed KPOM-TV directional antenna is feasible or that the manufacturer is capable of designing, constructing, and testing such an antenna to operate with a suppression ratio of 34 dB. In any event, the petitioner asserts that JDG's proposal to modify KPOM-TV's facilities to transmit a UHF signal with a directional antenna 19 dB over the maximum specified in the Commission's Rules is unprecedented, noting that past proposals involved applications for new facilities, not modifications to existing stations.[8] For these reasons, Tri-State alleges that these applications must be denied or set for an evidentiary hearing to determine whether their grant would be consistent with the public interest.

DISCUSSION

10. In challenging the KFAA assignment, pursuant to Section 309(d) of the Communications Act of 1934, as amended, Tri-State must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. §309(d)(1). *See also Astroline Communications Co. v. F. C. C.*, 857 F.2d 1556 (D.C. Cir. 1988). Once this pleading standard is satisfied, the Commission must determine whether the record as a whole (i.e., the application, the pleadings, and other matters which may be officially noted) presents a substantial and material question of fact requiring a hearing pursuant to 47 U.S.C. §309(d)(2). Against this backdrop, we turn to the initial question to be resolved here; namely, whether operation of KFAA as a satellite of KPOM-TV is warranted on economic grounds.[9] Having carefully reviewed the record before us, we believe that this question should be answered affirmatively.

11. When satellite operations were initially considered, the Commission authorized them in communities having no local television service. Over the years, however, that standard has evolved in order to provide the public in smaller markets with a choice of programs. Thus, even where a full-service station already serves an area, we have authorized competing satellite operations so long as the applicant has undertaken to establish a local studio and provide some local programming. *See, e.g., Midcontinent Broadcasting Co. of Wisconsin, supra.* One means of carrying out the goal of bringing services to these communities is reflected in Note 5 to Section 73.3555, which relaxes the multiple ownership restrictions involving satellite stations. In that context, we have authorized satellite stations in situations where otherwise prohibited signal overlap would exist between the parent and satellite station as a means of providing television service to small communities having an insufficient economic base to support a full-service television station. While we have generally required an economic study to demonstrate that the subject market would not support a full-service station, such a showing is not ordinarily required when "the economic justification may be inferred from the [small] size of the market." *Capitol Broadcasting Co.*, 54 RR 2d 811, 814, n.9 (1983). *See also Sainte Limited*, 3 FCC Rcd 185 (1988).

12. Having reviewed all of the pleadings, we conclude that, under the circumstances of this case, a grant of the assignment application, consistent with Note 5 to Section 73.3555, would be in the public interest. Rogers is a small community which receives the Grade B signal of three stations licensed to larger communities, but has no local television service.[10] It is not ranked as a television market, but is located on the periphery of the 119th ranked market and just outside of the 149th ranked market. We believe we can infer the economic justification for a satellite operation based on the small size of the population in and around Rogers. In addition, the presence of network affiliated stations within the service area and on cable systems lends further support for our belief that it is unlikely that Rogers will support a full-service independent station. Although petitioner claims that JDG has not demonstrated that a station with reduced facilities cannot be operated as an independent station, we believe that the public interest would be better served by allowing KFAA to operate as a satellite. In a community as small as Rogers, cutting back on the facilities would entail making the KFAA service area smaller, which may have an adverse effect on the financial viability of the station which is already at risk. Moreover, this argument undercuts petitioner's concern that the proposed modification of the KFAA facilities would eliminate or reduce authorized coverage, as a scaled down KFAA facility, operating as an independent, full-service television station, would be less likely to provide service to as many people. Therefore, we conclude that Rogers is that type of community in which the establishment of a satellite operation is appropriate.

13. We now consider the proposed modifications to KPOM-TV's existing and KFAA's authorized facilities. According to petitioner, JDG's proposal will result in a substantial and significant curtailment of service from that presently authorized. Petitioner correctly notes that any loss of service in an area is a matter of concern, absent a substantial showing of offsetting factors. In the case of unbuilt stations like KFAA, however, the Commission allows considerable latitude in the location of transmitter sites and in the modification of facilities. The same degree of latitude does not apply to KPOM-TV, for once in operation a station assumes certain obligations to the lis-

tening and viewing audience. In any event, a loss of service of the magnitude alleged meets the prima facie pleading standard of Section 309(d)(1) described above. Absent a substantial showing of offsetting factors, such a loss could raise substantial and material questions warranting designation for hearing of the proffered applications. For the reasons set forth below, however, we are convinced that that action would not be appropriate and that the public interest would be served by approval of the proposed combined KPOM-TV/KFAA operation.

14. The critical question thus before us in this case is whether the proposed curtailment of service from a KPOM-TV/KFAA satellite operation is offset by concomitant factors. The weighing process in which we engage to determine whether the projected loss of service will be counterbalanced by other factors involves more than a mere comparison of numbers. *WSET, Incorporated (WSET - TV)*, 80 FCC 2d 233 (1980); *West Michigan Telecasters, Inc.*, 22 FCC 2d 943 *recon. denied*, 26 FCC 2d 668 (1970), *aff'd sub nom. West Michigan Telecasters, Inc. v. F. C. C.*, 460 F.2d 883 (D.C. Cir. 1972). In that regard, we note that without a grant of the subject applications KFAA may not go on the air, thus depriving Rogers of its first television station and local programming. Nevertheless, it is alleged that the proposed facility modification to KFAA will reduce that station's coverage area as presently authorized, resulting in what the petitioner characterizes as a white area of 2,016 people. However, because KFAA is unbuilt and providing no existing service, we are in a position to be more flexible in determining whether the public interest is served by the proposed modification of that station's facility. Regardless of whether educational stations are considered in calculating loss areas in this context, we are not persuaded that the loss of anticipated service to 2,016 people must be considered a "white area" which is fatal to JDG's proposal. Having found that the small size of Rogers justifies a satellite operation and offers a practicable means for KFAA to go on the air, the benefits of establishing a competitively viable television operation outweigh the loss of anticipated service in this case, even more so when the alternative represents no effective service at all to these underserved areas.

15. With respect to KPOM-TV, it is clear that the proposed satellite operation will permit the existence of three strong network affiliates, and will result in significant service benefits both in the Fort Smith market and in underserved areas in and around Rogers. We note that as a result of the proposal: (1) nearly 30,000 people who are not now within the predicted Grade B contour of NBC service would for the first time be within the predicted Grade B contour of an NBC affiliate; (2) 698 people would be within the predicted Grade B contour of a second television service; (3) 12,676 people would be within the predicted Grade B contour of a third television service (although 2,967 people would lose such service); (4) 24,851 people would be within the predicted Grade B contour of a fourth television service (although 345 people would lose such service); and (5) 35,315 people would receive a predicted fifth television service (although 4,116 people would lose such service). These predicted service benefits substantially outweigh predicted detriments and, of themselves, appear in the public interest. Nevertheless, we must consider whether the benefits are offset by concomitant adverse factors. With regard to the 2,967 people that would be predicted to lose their only NBC programming, all but 20 would receive KPOM-TV predicted service from the proposed channel 61 Huntsville translator.[11] JDG has stated that it will assist these 20 in receiving service. Thus, this loss is clearly *de minimis*. Similarly, with regard to the 345 people who would lose a fourth television service, the small population makes this loss a minor factor.

16. Our conclusion does not require a finding that the proposed satellite operation is essential to the economic survival of KPOM-TV. While the proposed satellite operation would undeniably enhance JDG's ability to compete more effectively with KFSM-TV and with KHBS(TV) and its satellite KTVP(TV), a combined KMOP-TV/KFAA operation has other clear public interest benefits. As outlined above, we believe that JDG's proposal will establish a viable local television operation in Rogers (population 17,429), the type of community intended to be served by our satellite policy. The applicant pledges to maintain a full studio in the community of license and a fully staffed news and operations department where live local news will originate daily. Absent this proposal, it appears unlikely that Rogers and nearby underserved areas will be served by a viable local television operation. Accordingly, we conclude that the significant public interest benefits of the proposed KPOM-TV/KFAA satellite operation, including the provision of new and improved service to presently underserved areas, outweigh considerations disfavoring reductions in facilities.

17. Finally with respect to the proposed modification of the KPOM-TV facility, Tri-State alleges that a suppression of 34 dB will result in signal reception problems which Section 73.685(e) is meant to prevent. However, this conclusory assertion lacks the factual specificity necessary to raise a prima facie question under 47 U.S.C. §309(d)(1). No empirical data or other factual information which may be officially noted in this regard has been proffered by Tri-State. The proposed directional operation will minimize coverage in the direction of KFAA, while at the same time permitting improved coverage in the direction of KPOM-TV's city of license, Fort Smith. Even assuming *arguendo* that unforeseen difficulties with this antenna system do arise, any significant signal degradation that might occur lies in the overlap area to be served by the proposed KFAA satellite operation and, therefore, the viewing public in this case will not be adversely affected. However, based upon the information before us, it appears unlikely that signal reception problems will arise. As pointed out by the applicant, the manufacturer states that the proposed directional antenna with 34 dB suppression can be maintained successfully. Further, our records do not disclose that station WBBH(TV), which employs a similar antenna to that proposed for KPOM-TV, has encountered stability problems. In view of the foregoing, we find that the applicant has made an adequate showing with respect to use of a directional antenna with a maximum to minimum suppression ratio that exceeds 15 dB. Accordingly, we will waive Section 73.685(e) to permit the proposed operation.

18. For the reasons stated, we find the applicants qualified and that grant of the applications would serve the public interest, convenience and necessity. Accordingly, IT IS ORDERED, That the petition to deny filed by Tri-State Broadcasting Corporation IS DENIED.

19. IT IS FURTHER ORDERED, That the above-captioned application (BAPCT-860801LL) for consent to the assignment of the construction permit for unbuilt station KFAA(TV), Rogers, Arkansas, from John McCutcheon

d/b/a MCC Communications to J.D.G. Television, Inc., IS GRANTED; the applications (BMPCT-860807KF and BMPCT-860807KE) to modify both the authorized facilities of KFAA and the existing facilities of KPOM-TV, ARE GRANTED; and waiver of Section 73.685(e) of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The petition was originally filed by Kansas State Network (KSN), the former licensee of KSNF. The license of KSNF was assigned to Tri-State on February 27, 1987. Tri-State has adopted the position of KSN and has filed several related pleadings.

[2] JDG proposes to modify the currently authorized KPOM-TV directional antenna system by increasing the degree of suppression to the north while increasing radiation toward Fort Smith. Because the degree of suppression is approximately 19 dB over the 15 dB limit specified in Section 73.685(e) of the Commission's Rules, JDG requests a waiver of the maximum to minimum radiation ratio.

[3] A "white" area is defined as an area that is not within any predicted Grade B television contour, and a "gray" area is defined as an area within the predicted Grade B contour of only one station.

[4] JDG filed applications for three translators (i.e., channel 32, Rogers, channel 34, Bentonville, and channel 18, Springdale, Arkansas) on July 27, 1987. Petitioner argues that since the translator stations provide coverage essentially the same as that which KFAA would provide as a satellite, the Commission should defer action on the assignment and the modification applications until action has been taken on the translator applications. However, subsequent to the filing of these pleadings, the Rogers application was found to be inconsistent with the Commission's Rules and was therefore dismissed at the request of the applicant on May 27, 1988. The Bentonville application was granted on December 7, 1987, and was assigned the call letters K34BU. The Springdale application is still in pending status. We note that in connection with the Springdale and Bentonville applications, JDG states that if the applications at hand are granted and it successfully obtains the translators, they will be offered to a local community organization for use as low power stations. In view of these developments, it appears that the translator applications were not intended to, and do not provide, a viable alternative to the coverage proposed by the satellite operation.

[5] JDG states that the grant of its request for waiver of §73.685(e) of the Commission's Rules, contained in its application to modify KPOM-TV's facilities, will permit that station to more than double its signal strength over Fort Smith, and achieve substantial gains in underserved areas to the east and west of Fort Smith, thereby improving service to those areas while minimizing signal overlap with KFAA.

[6] With respect to terrain limitations affecting the Fort Smith service area noted above, JDG points to the 1973 application requesting creation of the KHBS/KTVP satellite, wherein that applicant relied in part on the obstruction of signal coverage north of Fort Smith due to the mountainous terrain.

[7] JDG claims that the petitioner's white area calculation disregards the service provided by noncommercial educational stations KAFT(TV), Fayetteville, and KEMV(TV), Mountain View, Arkansas, both of which place a Grade B signal contour over the area in question. Moreover, because KFAA is unconstructed, it contends that the proposed modification of the construction permit should not be construed as a "withdrawal of service" as alleged by the petitioner in its white area calculation. Nevertheless, it states that the overall service gains to be realized by the combined KPOM-TV/KFAA operation, combined with the availability of alternative video sources, outweigh the anticipated service losses, particularly if KFAA is not able to commence a financially viable service.

[8] In response, JDG states that contrary to the petitioner's claim, it is not proposing the use of a directional antenna to overcome substandard spacing, but to improve service to its community of license and outlying service areas, as well as to minimize overlap with KFAA, factors upon which the Commission has previously waived Section 73.685(e). Further, JDG asserts that there is no basis for the petitioner's attempt to make a distinction between UHF and VHF directional antennas, as the Commission has authorized suppression ratios in excess of 15 dB (and as high as 39.4 dB) for UHF stations as appropriate. The manufacturer of the proposed directional antenna states that proposed 34 dB suppression ratio in the antenna pattern can be maintained successfully under typical operating conditions, and that KPOM-TV's proposed antenna system is similar to that employed at UHF station WBBH(TV), Fort Myers, Florida, which has had excellent pattern stability.

[9] In this regard, we have assumed, *arguendo*, Tri-State's satisfaction of the prima facie pleading standard.

[10] Rogers is within the Grade B contours of KFSM-TV, channel 5 (CBS), Fort Smith, Arkansas; KODE-TV, channel 12 (ABC), Joplin, Missouri; and KTVP(TV), channel 29 (ABC), Fayetteville, Arkansas.

[11] An FCC Public Notice accepting and proposing for grant the Huntsville translator application was released on April 27, 1988. The application was not mutually exclusive with other TV translator or low power applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WATERFRONT COMMUNICATIONS CORP. File No. MW-2647

For a waiver of the Rules to permit use of equipment not type-accepted or type-notified under Part 94, operating with an emission bandwidth of 16400 kHz on non-standard frequencies in the OFS 2.4 GHz band

ORDER

Adopted: February 6, 1989; Released: February 7, 1989

By the Chief, Private Radio Bureau:

1. Waterfront Communications Corp. (Waterfront) provides private carrier communications services, typically for the transmission of video signals to its uplink facility, using channels in the 23 GHz band within a 25 mile radius of New York City. It has applied in the Private Operational Fixed Microwave Service (OFS) to operate a temporary fixed facility throughout New York and New Jersey. Waterfront seeks waiver of Sections 94.15(d), 94.65(e), 94.71(b), and 94.81 of the Commission's Rules[1] to permit employment of equipment not type-accepted or type-notified under Part 94 (although it is type accepted under Part 74), operating with emission bandwidth of 16400 kHz on non-standard frequencies in the OFS 2.4 GHz band.

2. Waterfront argues in support of its waiver request that it has received an increasing number of requests for its services, not only in the New York metropolitan area but throughout New York and New Jersey. Its current system cannot provide the necessary range. Waterfront states that it has searched the proposed coverage area for frequency usage and has found only two existing authorizations for fixed 2.4 GHz use.[2] Waterfront claims that its proposed frequencies and equipment are consistent with those permitted under the Auxiliary Broadcast Service for television relay and television translator relay stations and that this demonstrates that there is authority for the transmission of frequency modulated video signals at 2.4 GHz. Waterfront pleads that no party will be prejudiced by its request since its operations will be on a secondary basis to fixed users.

3. Pursuant to Section 1.3 of the Commission's Rules,[3] the Commission may waive any provision of its rules if it determines that good cause has been shown and that grant of the waiver does not undermine the policies embodied in the rule. *See WAIT v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983). We find that unique circumstances are involved in this case that justify grant of the waiver. First, no alternatives to the 2.4 GHz band appear available. The 13.2-13.25 and 23 GHz bands are the only other bands where temporary fixed operations are permitted, and rainfall would prevent either from providing the range or reliability required by Waterfront. Further, no fixed entities are currently authorized in the proposed area of operation and the secondary nature of the proposed system will ensure that future applicants are not precluded from this spectrum. Hence, Waterfront's system will have little, if any, negative effect upon use of 2.4 GHz spectrum in the New York area.

4. We conclude under these circumstances that waiver would serve the public interest. Accordingly, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, the request of Waterfront Communications Corp. for waiver of Sections 94.15(d), 94.65(e), 94.71(b) and 94.81 of the Commission's Rules IS GRANTED on a secondary basis for an indefinite term. This waiver is conditioned upon Waterfront's use of equipment type accepted under Part 74.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division

FOOTNOTES

[1] 47 C.F.R. §§ 94.15(d), 94.65(e), 94.71(b) and 94.81.

[2] Commission records indicate that these two authorizations are outside the proposed service area.

[3] 47 C.F.R. § 1.3.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-281

In the Matter of

Amendment of Part 15, Subpart C, of the Commission's Rules to require advisory Labeling of Radio Communications Receivers in light of the Electronic Communications Privacy Act of 1986. RM-5836

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 1, 1989; Released: March 3, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission is terminating this proceeding without adopting the proposed rules to require advisory labeling of scanning radio receivers and manually tuned radio receivers that are intended for use by the general public and are capable of receiving communications protected by the Electronic Communications Privacy Act of 1986 (ECPA).[1]

BACKGROUND

2. The ECPA was enacted expressly to extend the protections of the Omnibus Crime Control and Safe Streets Act (Safe Streets Act), 18 U.S.C. Sections 2510 - 2520., to radio communications. Generally, the Safe Streets Act, as modified by the ECPA, now prohibits, unless one party consents or a court order has been obtained, the interception of all forms of common carrier communications, except cordless telephones and tone-only paging communications, and of any non-common carrier or private radio communications when they are encrypted, scrambled, or "transmitted using modulation techniques whose essential parameters have been withheld from the public . . . ."[2]

3. On March 31, 1987 Regency Electronics (Regency) submitted a petition for rule making requesting that the Commission amend Part 15 of its rules to require the following advisory label on radio frequency scanning devices: "Improper use of this device may violate the provisions of the Electronics Communications Privacy Act of 1986 through the intentional unauthorized interception of protected radio communications." Regency stated that requiring labeling would help educate the public that certain uses of scanners could be illegal in light of the ECPA.

4. In response to the petition, the Commission, on May 27,1988, adopted a *Notice of Proposed Rule Making* (*Notice*) in the above captioned proceeding.[3] The Commission observed in the *Notice* that, while the ECPA placed no direct obligation on the Commission, the Senate Report that accompanied the ECPA indicates that labeling of devices might be an acceptable method of fostering compliance with the law.[4] Moreover, the Commission tentatively concluded that a label appeared to be the simplest and least burdensome method of advising general radio receiver and scanner users of ECPA prohibitions.[5] The *Notice* proposed that scanners and manually tuned receivers intended for use by the general public and capable of receiving protected communications be required to bear an advisory label concerning the ECPA. The *Notice* did not propose specific wording for the label, but instead requested comments as to the appropriate wording and message content of the label. Comments were also requested regarding the appropriate location for the label as well as the possibility of requiring not only a label but some accompanying instructive material pointing more specifically to communications intended to be protected by the ECPA.[6] The *Notice* also addressed the possibility of technically "blocking" frequencies which carry protected communications. The Commission noted, however, that this approach may not be practical because many frequencies are used for both protected and unprotected communications.[7] Comments were filed by ten parties and reply comments were filed by four parties. A list of the parties filing comments and reply comments is contained in appendix A.

COMMENTS

5. The comments received in response to the *Notice* were primarily from two groups, cellular radio telephone interests, and organizations whose members have a common, active interest in the recreational monitoring of the radio spectrum.[8] All of the comments oppose the specific proposal set forth in the *Notice*, but for different reasons. The cellular radio telephone group believes that labeling is an insufficient means for ensuring the ECPA intended protection of cellular communications. Some commenters argue that a warning label, by calling attention to the prohibited activity, might actually encourage violations of the ECPA. Other commenters argue that compliance with an advisory labeling requirement may shield manufacturers from liability for violations of the ECPA. Telocator expresses this concern when it states that, "[b]y reducing the manufacturers' risk of liability the Commission may in turn, also reduce the economic incentive of the manufacturer to modify its receivers in a manner that will prevent the unauthorized interception of protected communications."[9]

6. The recreational radio monitoring interests agree that some communications should be protected, but disagree with our proposed method. The Scanner Association of North America (SCAN) in its comments asserts that if labeling requirements for receivers are adopted, then transmitters capable of transmitting protected communications should also be labeled to alert users that their conversations may be monitored. SCAN suggests that, in addition to the advisory label, a clear explanation be contained in the owners manual or elsewhere defining "protected communications." SCAN goes on to explain that, without such an explanation, the label may merely

serve to disturb the consumer, or might convey the wholly unwarranted and highly objectionable impression that the mere possession of the device is a violation of the ECPA. The Association of North America Radio Clubs (ANARC) agrees with SCAN that information sufficient to deter violations of the ECPA cannot be contained on a label and suggests at least a full page statement devoted to explaining the provisions of the ECPA be contained in the instruction manual accompanying the device.

7. Two commenters, Telocator and ANARC, contend that it is premature to consider actions concerning the ECPA since the law has been in existence for only a short time.[10] Telocator and ANARC argue that there has not been a demonstrated need for the Commission to take any action concerning the provisions of the ECPA. They indicate there was no evidence supplied in support of Regency's petition nor any evidence submitted that the ECPA is ineffective. ANARC states that the ECPA does not require the Commission to take action at this time. ANARC cites the Commission's July 17, 1987 *Memorandum Opinion and Order* regarding the Washington Legal Foundation (WLF) petition in which the Commission stated the ECPA has not been in existence for a sufficient time to determine if the legislation and voluntary efforts will not be adequate to achieve the security of protected communications.[11] Some cellular commenters believe that manufacturers should be prohibited from marketing devices capable of receiving communications protected by the ECPA. They support a requirement that certain frequencies be blocked.

DISCUSSION

8. We do not believe that technically blocking frequencies is a desirable approach. As pointed out in the *Notice*, although the ECPA prohibits interception of certain classes of communications, the frequencies on which these communications are transmitted can be used for unprotected transmissions as well. In addition, the ECPA does not prohibit the manufacture and sale of scanners or any receiver based solely on the ability to receive specific frequencies.

9. With respect to the issue of labeling, we agree with some of the commenters that, in some instances, a warning label, by calling attention to a prohibited activity, might encourage it. We are also persuaded that given the complexities of the ECPA it is impractical for a single label to provide sufficient information to properly advise users of the legal requirements. Furthermore, we note from the comments in this proceeding that some manufacturers are voluntarily taking steps to comply with the intent of the ECPA either by informing users of ECPA provisions or by redesigning equipment to omit certain frequencies.

10. In view of the above considerations, we believe that regulatory action is not necessary at this time. Therefore, the proposed labeling requirement is not being adopted.

REGULATORY FLEXIBILITY FINAL ANALYSIS

11. Pursuant to 5 U.S.C. 601 et seq., the Final Regulatory Flexibility Analysis has been prepared.

I. ***Need and purpose of this action:***

The regulations proposed were found to be unnecessary at this time. The record in this proceeding does not sufficiently demonstrate a need for Commission action. Therefore, this proceeding is being terminated.

II. ***Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:***

No comments were received that specifically addressed the Initial Regulatory Flexibility Analysis. No changes to the regulations are being adopted and there is no impact on the public.

III. ***Significant alternatives considered and rejected:***

The Commission considered all the alternatives in this proceeding and considered all timely filed comments directed to the various issues in the *Notice*. After weighing all aspects of this proceeding, the Commission has adopted the most reasonable course under the mandate of the Communications Act of 1934, as amended.

PAPERWORK REDUCTION ACT STATEMENT

12. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new information collection requirements.

ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Commenters

Initial Comments:

1. Association of North American Radio Clubs.
2. BellAtlantic Mobile Systems, Inc.
3. BellSouth Corporation.
4. Cellular Telecommunications Industry Association.
5. Communications Electronics, Inc.
6. Gardner, William R.
7. GTE Mobilnet, Inc.
8. NYNEX Mobile Communications Company.
9. Scanner Association of North America.
10. Telocator.

Reply Comments:

1. Association of North American Radio Clubs.

2. Cellular Telecommunications Industry Association.
3. Scanner Association of North America.
4. Telocator.

FOOTNOTES

[1] Pub. L. No. 99 - 508, 100 Stat. 185 (1986).

[2] 18 U.S.C. Section 2510(16)(B).

[3] *See Notice of Proposed Rule Making*, Gen. Docket No. 88-281, 3 FCC Rcd 3725 (1988).

[4] *Id.* at 3725 - 26.

[5] *Id.* at 3726.

[6] *Id.*

[7] *Id.* at 3725.

[8] In addition, one commenter addressed the labeling of devices capable of decoding encrypted police information. This comment is not addressed in this proceeding because it is beyond the scope of this proceeding.

[9] Telocator is the national trade association representing the mobile communications industry. Its members include cellular telephone companies.

[10] The ECPA was adopted October 12, 1986, and became effective January 19, 1987.

[11] *See Memorandum Opinion and Order*, RM-5577, 2 FCC Rcd 4311 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-35

In the Matter of

Definition of a Cable
Television System

NOTICE OF PROPOSED RULE MAKING

Adopted: February 1, 1989; Released: March 3, 1989

By the Commission:

1. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act)[1] was signed into law, establishing a national policy concerning cable communications "that clarifies the current system of local, state and Federal regulation of cable television."[2] In order to implement provisions of the Act, we adopted certain amendments to Parts 1, 63, and 76 of the Commission's Rules. *Cable Communications Act Rules*, 58 RR 2d 1 (1985), *modified*, 104 FCC 2d 386 (1986), *aff'd in part and rev'd in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). The implementation of one of our conforming rule amendments has given rise to certain questions, which lead us to issue this Notice of Proposed Rule Making.

2. The Cable Act defines a cable system as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ." 47 U.S.C. Section 522(6). That same section also excludes from the definition of a cable system "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way . . . ." 47 U.S.C. Section 522(6)(B). In adopting our implementing rules, we adopted the Act's definition and exclusions, including the one noted above, as a conforming rule change. *Cable Communications Act Rules*, *supra*. *See also* 47 C.F.R. Section 76.5(a). In doing so, we stated that "[w]ith regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way." *Cable Communications Act Rules*, 58 RR 2d at 11. On reconsideration, we further stated that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management." *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d at 396-397. Recent decisions by two federal district courts, however, have raised significant questions concerning both the Commission's construction of the multiple unit dwelling exception to the cable definition and the application and scope of the basic definition itself.[3]

3. Specifically, in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 slip op. (D.N.D. Mar. 28, 1988), the district court found that the delivery by infrared transmissions of video programming to multiple unit dwellings that were not commonly owned, controlled or managed rendered the facilities involved a cable television system within the meaning of Section 522(6) of the Communications Act of 1934, as amended. Because cable systems are required by the Act to obtain a franchise from local authorities and the service provider in this case, Prime Time Entertainment, Inc. (Prime), had not done so, the court concluded that Prime's operations were impermissible. Accordingly, the court enjoined Prime from providing service over its existing facilities until the requisite franchise was obtained. In its decision, the court specifically addressed the applicability to Prime of the multiple unit dwelling exception to the cable definition. It found the exception to be unavailing in the circumstances of the case before it because the units served by Prime were not commonly owned, controlled or managed.[4] In reaching this determination, the court expressly rejected the Commission's interpretation of the Section 522(6)(B) exception, noted above. The court concluded that the Commission's disregard of the common ownership, control or management aspect of the exception and its exclusive reliance on the crossing of a public right-of-way as dispositive of the exception's applicability was erroneous "because it contravenes unambiguous Congressional intent."[5]

4. Two basic aspects of the *Fargo* decision invite particular attention. First, the court's rejection of our construction of the multiple unit dwelling exception suggests a clear need to revisit this area. After a preliminary review, we are inclined to concur in the court's view that the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed *and* there is no crossing of a public right-of-way involved. Commenters are welcome to propose alternative constructions of the statutory exception, but in doing so they should carefully document their supporting arguments. Comments are also sought specifically with respect to the question of what constitutes a crossing of a public right-of-way, including but not limited to the use of infrared technology.

5. Second, the possible implication in the *Fargo* court's decision that Prime's wireless, infrared transmission system might satisfy the basic statutory definition of a cable system as a "set of closed transmission paths and associated signal generation, reception and control equipment . . . designed to provide cable service" has potentially troubling implications. We are especially concerned that the potential inclusion within the cable definition of a nontraditional delivery system such as infrared extends the definition in a manner that may be inappropriate and inconsistent with congressional intent. This could presage other possibly inapt extensions of the definition that would require the treatment of additional wireless video delivery systems as cable systems as well. Indeed, in a very recent decision, another federal district court apparently concluded that the interception of local television broadcast signals and their national retransmission via space satellite to individual home satellite-receive facilities constituted a cable television system within the meaning of the Communications Act. *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565

(N.D.Ga. 1988).[6] For purposes of the cable system definition, the service provided by Satellite Broadcast Networks, Inc. (SBN), in that case is difficult to distinguish from the service proposed to be provided by Direct Broadcast Satellite (DBS) systems. DBS, like other analogous services, including the Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS), is designed to deliver video programming to multiple subscribers in a community. Yet, it seems clear that Congress did not intend in adopting the Cable Act to include these alternate delivery systems within the statutory definition of a cable system. Several considerations prompt our view in this regard.

6. First, nowhere in the Cable Act or in its legislative history is there an affirmative statement that Congress meant to define a cable system so broadly as to incorporate such services as MDS, MMDS, DBS or Satellite Master Antenna Television (SMATV). This omission is significant since such a broad definition of a cable system represents a dramatic departure from longstanding and consistent Commission practice in regulating cable television service.[7] Ordinarily, such a radical change would be expected to prompt specific congressional comment, particularly since Congress was plainly aware of the discrete nature of the alternative video services involved when it adopted the statutory definition and appeared to anticipate their being subject to a different form of regulation than cable.[8] Second, the statutory scheme adopted in the Cable Act is, in many fundamental respects, entirely inappropriate for such alternative services as MDS and DBS. Local franchising requirements, for example, are completely incompatible with the national service characteristics of a DBS system.[9] Finally, we believe the language of the definition itself -- particularly the requirement that a cable system consist of a "set of closed transmission paths" -- contemplates excluding delivery systems that exclusively or primarily utilize "radiating" technology to deliver service to end users.

7. In view of the foregoing analysis, we seek comment concerning the proper scope and application of the cable system definition contained in Section 522(6) of the Act and whether, and in what manner, we should amend our rules or existing interpretations of our rules to properly reflect the statutory definition. We are particularly concerned that delivery systems apparently not intended to be included within the definition -- such as SMATV, DBS, MDS, MMDS and leased uses of Instructional Television Fixed Service (ITFS) channels -- not fall within the ambit of any interpretation or definition we may eventually adopt. In this connection, we specifically request that commenters address whether existing language in the definition -- for example, the requirement that a cable system be comprised of a "set of closed transmission paths" -- adequately distinguishes traditional cable systems from alternative video delivery services.

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

8. *Reason for action*. This action is taken to implement certain provisions of the Cable Communications Policy Act of 1984.

9. *Legal basis*. Authority for action as proposed for this Rule Making is contained in Section 4(i) and Section 303 of the Communications Act of 1934, as amended.

10. *Description, potential impact and number of small entities affected*. The Commission seeks comment in this proceeding on two basic issues related to the definition of a cable television system in the Communications Act. First, noting the decision in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 (D.N.D. Mar. 28, 1988), in which the district court found the Commission's broad construction of the multiple unit dwelling exception to the cable definition to be erroneous, the Commission invites comment on the appropriate interpretation of the exception. In this regard, the Commission expressed its preliminary concurrence in the court's opinion. Under the court's view of the exception, a facility otherwise qualified as a cable system under the basic definition would be excluded from the definition only if it both (a) exclusively serves multiple unit dwellings under common ownership, management or control *and* (b) the facility does not cross any public right-of-way. If this view is ultimately adopted by the Commission, some small entities might be considered cable television systems that were previously deemed exempt. This reclassification could result in substantial burdens for the affected entities, including a requirement that a franchise be obtained and adherence to Commission rules and statutory requirements for cable systems. Second, the Commission notes its concern that the *Fargo* decision could be read to imply that a video delivery system that used primarily a technology other than wire or cable in providing its services could nonetheless be a cable system under the Communications Act. The Commission questions whether such a broad interpretation of the definition -- and that of a second district court which found the direct-to-home delivery of broadcast signals via satellite to constitute a cable system -- are consistent with the statutory language in the Act and congressional intent underlying that language. Accordingly, the Commission invites comment on the appropriate scope and application of the basic cable definition. Adoption of the broad view of the definition could result in certain entities not now deemed to be cable systems, including DBS, MDS, MMDS and SMATV systems, being considered cable systems. As already noted in connection with the scope of the exception to the definition, this would result in the application of various regulatory and statutory requirements to these systems, and the imposition of corresponding burdens, which have not been heretofore applied.

11. *Recording, record keeping and other compliance requirements:* None

12. *Federal rules which overlap, duplicate or conflict with this rule:* None.

13. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives by the Act:* None.

PAPERWORK REDUCTION ACT IMPLICATIONS

14. The proposal contained herein has been analyzed with repect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens upon the public.

PROCEDURAL MATTERS

15. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See Generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

17. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before **May 2, 1989**and reply comments on or before **June 1, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

18. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibilty analysis. The Secretary shall cause a copy of the *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. Section 601 *et seq.* (1981)).

19. In accordance with the provision of Section 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission Dockets Reference Room (Room 239) at its headquarters in Washington, D. C. (1919 M Street, N. W.).

20. For further information concerning this proceeding, contact Barrett L. Brick, Cable Television Branch, Mass Media Bureau (202) 632-7480.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pub. L. No. 98-549, Section 1 *et seq.*, 98 Stat. 2779 (1984) (codified principally at 47 U.S.C. Sections 521-639). The Cable Act amends the Communications Act of 1934, as amended, 47 U.S.C. Section 151, by adding, *inter alia*, a new Title VI.

[2] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 19 (1984).

[3] While the decisions of the district courts do not settle questions of national communications policy, *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 and n.5 (1984), the potential adverse effect of disparate opinions of the district courts on fundamental definitional questions such as those at issue in these cases is significant. Indeed, it was for this reason that the Commission expressly requested referral on primary jurisdiction grounds in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 slip op. (D.N.D. Mar. 28, 1988), discussed below. The district court, however, denied our request. Accordingly, to avoid these potential adverse effects and to provide certainty and uniformity in this area, we believe this Rule Making proceeding is advisable.

[4] As a result, the court did not reach the question of whether the interconnection of multiple unit dwellings by infrared transmissions constituted a crossing of a public right-of-way. We note, however, that the Mass Media Bureau, in informal opinions issued pursuant to delegated authority, has expressed the view that the linkage of two SMATV systems by infrared transmissions does not constitute a crossing of a public right-of-way. *See Channel One, Inc.* (letter dated February 25, 1986) and Letter to Mark J. Tauber and Deborah C. Costlow (dated December 19, 1985).

[5] *City of Fargo v. Prime Time Entertainment, Inc.*, slip op. at 9.

[6] The court reached this determination in the context of finding that, under the provisions of the Copyright Act of 1976, 17 U.S.C. Section 101, *et seq.*, Satellite Broadcasting Networks,

Inc. (SBN), was not entitled to a compulsory license to distribute the broadcast signals it was delivering to homes by satellite. The court detailed two rationales for its finding. First, the court concluded that SBN was ineligible for a compulsory license because only cable systems were entitled to the license and SBN's facilities did *not* meet the definition of a cable system in the Copyright Act. Second, the court noted that, under the Copyright Act, a compulsory license is only available with respect to signals the carriage of which is permissible under the rules of the FCC. The court found that SBN's service did not meet this criterion because SBN *did* constitute a cable system under the definition in the Communications Act and it had not obtained certain service authorizations required of cable systems.

[7] Until 1977, the Commission expressly defined a cable system as a facility that delivered service by "wire or cable," thereby limiting the definition to traditional cable systems and excluding wireless technologies. *See Cable Television Report and Order and Reconsideration*, 36 FCC 2d 1, 74 (1972) (former Section 76.5(a) of the rules adopted therein). In 1977, the Commission revised the definition by substituting the term "a set of transmission paths" for "wire or cable." In doing so, however, the Commission specifically noted its intent that the new definition "not be interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems . . . ." *First Report and Order* in Docket No. 20561, 63 FCC 2d 956, 966 (1977). This definition remained in effect, without relevant change, until adoption of the Cable Act in 1984.

[8] For example, in reviewing recent developments in the home video industry, the Report of the House Committee on Energy and Commerce accompanying H.R. 4103 (the House version of the Cable Act) noted that "[n]ew forms of competition to cable were initiated or began to show promise of emerging during this period. These include the SMATV industry, multi-channel MDS, Direct Broadcast Satellite (DBS), subscription television, and the explosion in home video cassette recorders." H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 22. Indeed, the House Report directly reflects Congressional awareness of the regulatory distinctiveness of cable in expressing its concern for competitive balance among the different video delivery systems. In this connection, the House Report stated:

> [I]n adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV and subscription television. The public interest is served by this competition, and it should continue.

Id. at 22-23.

[9] We also note that the dual, federal-local jurisdictional approach to regulating cable television service -- a central component of the statutory scheme -- is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction and use of public rights of way in the communities they serve. Yet, these distinctive traits are absent in the alternative delivery systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Addition of New Section 1.13 to
the Commission's Rules of Practice
and Procedure

REPORT AND ORDER

Adopted: February 15, 1989; Released: March 3, 1989

By the Commission:

1. This Report and Order adds a new section 1.13 to the Commission's rules of practice and procedure. The new rule designates the office and officer to receive petitions for review of Commission decisions filed in the United States courts of appeals[1] by parties who wish to take advantage of the new statutory procedures for selecting a court of appeals when multiple petitions for review of an agency decision are filed in different courts.[2]

DISCUSSION

2. Public Law 100-236, 101 Stat. 1731, enacted on January 8, 1988, amends section 2112(a) of title 28 of the United States Code, 28 U.S.C. § 2112(a), to simplify the selection of the court to hear petitions for review of an agency order in those cases where petitions for review are filed in more than one court of appeals. [3] The new section 2112(a) establishes procedures that amend the "first-to-file" rules previously used for court selection.

3. The new section 2112(a) procedures apply only when copies of date-stamped petitions for review filed with courts of appeals are received by the agency within ten days after issuance of the agency order. Section 2112(a)(2) provides that each agency shall designate by rule the office and the officer who must receive such petitions for review. Accordingly, by this Report and Order we are adding a new section 1.13 to our rules to designate the Office of General Counsel as the office, and the General Counsel as the officer, to receive copies of date-stamped, court-filed petitions for review for purposes of section 2112(a). Parties wishing to take advantage of the procedures set forth in section 2112(a) should file copies of date-stamped, court-filed petitions for review with the General Counsel in the Office of General Counsel, Room 614, 1919 M Street, N.W., Washington, D.C. 20554. All copies of such petitions for review must be so filed by 5:30 p.m. of the tenth day after the date of issuance of the agency order. The ten-day filing period for filing such copies of petitions for review shall be calculated in accordance with section 1.4 of the Commission's rules, 47 C.F.R. § 1.4. The date of "issuance" of a Commission order is deemed to be the date of public notice as defined in section 1.4(b) of the Commission's rules.[4] A stamp indicating the time and date received by the Office of General Counsel will constitute proof of filing.[5]

4. As required by the new section 2112(a), when the Office of General Counsel receives copies of more than one petition for review within ten days after the issuance of a Commission order *(i.e.*, within ten days of the date of public notice as defined by section 1.4(b)), it will notify the Judicial Panel on Multidistrict Litigation authorized by 28 U.S.C. § 1407.[6] By means of random selection, that panel will then designate one court of appeals and issue an order consolidating the petitions for review in that court of appeals.[7] The Office of General Counsel will then file the record in the designated court. 28 U.S.C. § 2112(a)(3). If copies of petitions for review filed in only one court of appeals are filed with the Office of General Counsel within the ten-day period, the record will be filed in that court notwithstanding institution of proceedings for review in any other court of appeals. *Id.*, § 2112(a)(1).[8]

5. In addition, we are also indicating that copies of notices of appeals filed pursuant to 47 U.S.C. § 402(b) should be served upon the General Counsel.[9] In addition, for administrative efficiency, we request that any petitioner seeking judicial review pursuant to 47 U.S.C. § 402(a) serve a copy of its petition on the General Counsel regardless of whether it wishes to avail itself of the procedures for multiple appeals set forth in 28 U.S.C. § 2112(a). Finally we are making a conforming amendment to section 0.401 of our Rules.

6. ACCORDINGLY, IT IS ORDERED that the amendments to section 0.401, 47 C.F.R. § 0.401, and new section 1.13 of the Commission's rules, 47 C.F.R. § 1.13, as set forth in Appendix A below, are ADOPTED.

7. IT IS FURTHER ORDERED that these rule changes SHALL BECOME EFFECTIVE upon publication in the Federal Register. *See* 5 U.S.C. § 553(d).

8. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(1), 303(r) and 28 U.S.C. § 2112(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

1. The authority citation for Part 0 continues to read:

Authority: Section 5, 48 Stat. 1068, as amended: 47 U.S.C. 155, unless otherwise noted:

2. Section 0.401 is amended by adding a new paragraph (a)(5) to read as follows:

§ 0. 401 Location of Commission offices.

* * * * *

(a) * * *

(5) The location of the Office of General Counsel is Room 614, 1919 M Street, N.W. Washington, D.C. 20554.

3. The authority citation for Part 1 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement 5 U.S.C. 552, unless otherwise noted.

4. A new section 1.13 is added to read as follows:

§ 1.13 Filing of petitions for review and notices of appeal of Commission orders.

(a) (1) This subsection pertains to each party filing a petition for review in any United States court of appeals of a Commission order, pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), and 28 U.S.C. § 2342(1), that wishes to avail itself of procedures established for selection of a court in the case of multiple appeals, pursuant to 28 U.S.C. § 2112(a). Each such party shall, within ten days after the issuance of that order, file with the General Counsel in the Office of General Counsel, Room 614, 1919 M Street N.W., Washington, D.C. 20554, a copy of its petition for review as filed and date-stamped by the court of appeals with which it was filed. Such copies of petitions for review must be filed by 5:30 p.m. Eastern Time on the tenth day of the filing period. A stamp indicating the time and date received by the Office of General Counsel will constitute proof of filing. Upon receipt of any copies of such petitions for review, the Commission shall follow the procedures established in 28 U.S.C. § 2112(a) to determine the court in which to file the record in that case.

(2) Computation of time of the ten-day period for filing copies of petitions for review of a Commission order for purposes of subsection (a)(1) shall be governed by § 1.4. The date of issuance of a Commission order for purposes of filing copies of petitions for review shall be the date of public notice as defined in § 1.4(b).

(b) Copies of notices of appeals filed pursuant to 47 U.S.C. § 402(b) shall be served upon the General Counsel.

NOTE: For administrative efficiency, the Commission requests that any petitioner seeking judicial review of Commission actions pursuant to 47 U.S.C. § 402(a) serve a copy of its petition on the General Counsel regardless of whether it wishes to avail itself of the procedures for multiple appeals set forth in 47 U.S.C. § 2112(a).

FOOTNOTES

[1] Under section 402(a) of the Communications Act and U.S.C. § 2342(1), petitions for review of non-licensing decisions may be filed in any United States court of appeals other than the United States Court of Appeals for the Federal Circuit. Under section 402(b) of the Communications Act, appeals of licensing decisions may be filed only with the United States Court of Appeals for the District of Columbia.

[2] Because this provision relates to Commission practice and procedure, we are dispensing with prior notice and comment procedures. *See* 5 U.S.C. § 553(b)(A).

[3] Section 3 of the Act adopting the amendments to section 2112(a) provides that the amendments take effect 180 days after the date of enactment. 101 Stat. 1732. Accordingly, the amendments became effective on July 6, 1988.

[4] Thus, the first day of the ten-day time period will be the day after the date of public notice as that date is defined in section 1.4(b) of our rules. *See* 47 C.F.R. § 1.4(b). We note that the agency has "considerable discretion to decide when an order may fairly be deemed to have been 'issued'." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 676 (1950). Section 1.103(b) of the Commission's rules, 47 C.F.R. § 1.103, already states that for purposes of seeking judicial review, Commission actions shall be final on the date of public notice. *See Western Union Telegraph Co. v. FCC*, 773 F.2d 375 (D.C. Cir. 1985); *Addition of new Section 1. 103 to the Commission's Rules of Practice and Procedures*, 85 FCC 2d 618 (1981).

[5] We emphasize that only receipt by the Office of General Counsel will constitute receipt of copies of petitions for review. Receipt by the Commission's Mail Room, Office of the Secretary, or any Bureau Office will not be sufficient.

[6] We note that the filing of a petition for review with the court within the ten-day period will not be sufficient to trigger these procedures; the new section 2112(a) requires that the copy of the petition for review must be filed with the designated agency officer in the designated office within the ten-day period. Of course, any petitions for review not received by the Commission within the prescribed ten-day period will not be included in the Judicial Panel for Multidistrict Litigation's random selection procedure.

[7] Subsection 2112(a)(3) of the Act provides for the judicial panel on multidistrict litigation to prescribe rules with respect to the consolidation of proceedings. The panel promulgated procedural rules governing the filing of notice of multiple appeals and other related matters on June 14, 1988. *Order Adopting Rules of Procedure of the Judicial Panel on Multidistrict Litigation as Amended*, 120 F.D.R. 251 (J.P.M.L. 1988).

[8] These statutory procedures will be followed as a matter of course and are not incorporated into the new rule adopted herein. In accordance with section 2112(a)(5), [a]ll court in which proceedings are instituted with respect to the same order, other than the court in which the record has been filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed." *Id.*, § 2112(a)(5).

[9] Section 402(c), 47 U.S.C. § 402(c), requires a party filing a notice of appeal pursuant to section 402(b) to serve a copy of such notice upon the Commission. By this rule amendment, we are requiring that the place of such service should be the Office of General Counsel rather than the Secretary's Office.

Before the
Federal Communications Commission
Washington, D.C. 20554

Michael S. Saxton and Roberta Steele d/b/a SAXTON STEELE COMMUNICATIONS Julian, California

File No. BPH-850712G3

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1989; Released: March 3, 1989

By the Commission:

1. The Commission has before it an application for review filed on July 24, 1987, by Michael S. Saxton and Roberta Steele d/b/a Saxton Steele Communications ("Saxton Steele" or "applicant"), one of six applicants who applied for a construction permit to build a new FM radio station to serve Julian, California. Saxton Steele seeks review of the Audio Services Division's June 24, 1987 decision denying reconsideration of the dismissal of Saxton Steele's application as unacceptable for filing. This dismissal took place on February 3, 1987, after the Chief, FM Branch, determined that the subject proposal was short-spaced to KFMB-FM, San Diego, California.

2. *Background*. The following events preceded the instant application for review: Saxton Steele's application, originally filed on July 12, 1985, was first returned on August 20, 1985 for failure to submit a transmitter site map which complied with the Commission's *Public Notice*, Mimeo 3693, released April 5, 1985, and called for by FCC Form 301, §V-B, Item 13. Compliance with the topographic site map requirements set forth in this *Public Notice* is one of many elements evaluated in the course of a tenderability study performed on every application.[1] A petition requesting reconsideration and reinstatement was filed by Saxton Steele on September 19, 1985. The Chief, Audio Services Division denied this petition on March 18, 1986, prompting Saxton Steele to file an application for review on April 17, 1986. By means of *FM Transmitter Site Map Submissions Required by FCC Forms 301 and 340*, 1 FCC Rcd 381 (1986), (Site Map *Order)* the Commission announced that due to inadequate notice of the requirements of the April 5, 1985 *Public Notice*, (*Notice)* those applications that had been returned for failure to comply therewith, which had preserved their rights on appeal, would be reinstated *nunc pro tunc*. By virtue of this decision, Saxton Steele's application became eligible for *nunc pro tunc* reinstatement. The Site Map *Order* did not, itself, reinstate qualifying applications. Stating clearly that such applications *"shall* be reaccepted *nunc pro tunc"*, the Commission specifically directed the *staff* to take this action. 1 FCC Rcd at 382. On December 4, 1986, several days before the staff acted to reinstate the subject application, Saxton Steele submitted a new transmitter site map which satisfied the requirements of the *Notice*. This amendment prematurely identified the subject application as one that had been reinstated *nunc pro tunc*. Actual reinstatement of Saxton Steele's application, however, did not take place until December 12, 1986, when by letter the staff took such action but ordered the applicant to submit a topographic site map in compliance with the *Notice* within 15 days.[2] On December 17, 1986, the Commission issued a *Public Notice* announcing that Saxton Steele's application had been reinstated *nunc pro tunc* and was tendered for filing.[3] Subsequently, however, while conducting the acceptability study, the staff discovered that the applicant's proposal violated the minimum distance separation requirements found in 47 C.F.R. § 73.207, and on February 3, 1987, dismissed the application as unacceptable for filing. Saxton Steele then filed a petition for reconsideration on March 5, 1987, which was denied by the Chief, Audio Services Division on June 24, 1987.

3. In support of the instant application for review, Saxton Steele does not dispute that its proposal fails to comply with the Commission's minimum distance separation requirements. Rather, the applicant charges that the Commission, through its unclear and confusing FM processing procedures, deprived the applicant of the thirty day amendment as-of-right period, and thus the opportunity to cure the spacing deficiency. According to Saxton Steele, this occurred because of misleading language in the December 17, 1986 *Public Notice* announcing that Saxton Steele's application had been tendered for filing, the staff's December 12, 1986 reinstatement letter, and the Site Map *Order*.

4. Turning to these assertions, we note that Saxton Steele acknowledges that its application appeared on a *Public Notice* under the caption "Applications Tendered For Filing and Associated Major Environmental Action Narrative Statement, If Indicated, Accepted For Filing", on December 17, 1986. However, the applicant asserts that the phraseology of the caption of this notice was insufficient to alert it to the fact that the subject application had been accepted for tender, thus likewise failing to inform it of the thirty day amendment period which begins when this notice is issued. Saxton Steele argues: "[This] notice at no point states that the [instant] application had been 'accepted for tender', only that it was tendered for filing and reinstated *nunc pro tunc* . . . .If [this] notice was intended to advise the applicant that its application had been accepted for tender, with the attendant obligation . . . to amend . . . within a thirty day period, it should have spoken in those terms." Application for Review, p.4. Saxton Steele additionally asserts that the legal significance of this *Public Notice* is further obscured by the fact that it is worded identically to notices issued for AM applications indicating receipt for tender, but which do not cause a similar thirty day amendment period to commence. Saxton Steele declares that this distinction between the two services is arbitrary and capricious and, as such, warrants revision as a matter of law and equity. (A/R,p.5)

5. Alternatively, Saxton Steele argues that, even if it can be said that the wording of this notice is sufficient to advise that an application has been accepted for tendered and thereby signal commencement of the amendment period, the Commission, by means of the reinstatement letter and the Site Map *Order* "explicitly instructed" that it refrain from filing any amendments, other than the corrected topographic site map. Thus, Saxton Steele claims that it was misled by the Site Map *Order* and reinstatement letter and effectively deprived of the amendment as-of-right period.

6. *Discussion.* Saxton Steele quibbles about the terminology used in the *Public Notice*, arguing essentally that it should read "accepted for tender" rather than "tendered for filing" in order to signify that an application has passed tenderability review. Because the December 17, 1986 *Public Notice* failed to state that its application had been "accepted for tender," Saxton Steele maintains that it would be arbitrary and capricious to impute such a meaning to the *Public Notice*. However, the Commission provided explicit notice that such language would be used to notify applicants that their applications had been found tenderable: "FM broadcast applications found tenderable pursuant to the criteria adopted in [the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985)] appear on a Commission Public Notice under the heading 'FM Broadcast Applications Tendered for filing.' This constitutes the Notice of Tenderability for the listed applications." In re *Amendment of §§ 73. 3572 and 73. 3573 Relating to Processing of FM and TV Broadcast applications*, 59 RR 2d 100, 102 at n.7 (1985). Accordingly, we reject Saxton Steele's claim that it was not given sufficient notice that its application had been accepted for tender. Also, having provided explicit notice of the terminology used in a notice of tenderability for FM broadcast applications and the attendant rights and obligations occasioned by that notice, we must reject Saxton Steele's claim that the meaning of the December 17, 1986 *Public Notice* was not clear because notices for AM applications, which utilize the same language, do not occasion the same rights and obligations.[4]

7. Even if we conclude that the December 17, 1986 *Public Notice* provided sufficient notice that Saxton Steele's application had been accepted for tender thereby beginning the thirty day amendment period, Saxton Steele claims that the Site Map *Order* and reinstatement letter provided conflicting instructions not to amend its application in any way except to provide a corrected topographic site map. Thus, Saxton Steele maintains that it was misled by the Site Map *Order* and reinstatement letter and effectively denied an amendment as-of-right period. To reach such a conclusion, one would have to consider certain language in these two documents out of context and without regard to established rules governing the processing of FM broadcast applications. However, in its proper context, this language cannot be ascribed the restrictive interpretation Saxton Steele advances.

8. Having determined that proper notice had not been given of the topographic site map requirements, the Commission, in the Site Map *Order*, directed the staff to reinstate *nunc pro tunc* those applications pending on appeal which had been returned as not sufficient for tender for failure to comply with the requirements in the *Notice*. In a footnote to this directive, the Commission further noted that applicants whose applications were pending as of the effective date of the Site Map *Order* would be "permitted to amend their applications to correct this deficiency only." 1 FCC Rcd 382-83 at n.5. From this language, Saxton Steele concluded that it had been explicitly instructed not to file any other amendments to its application. Such a conclusion is unfounded. Because the rules generally prohibit the filing of amendments to cure tenderability defects (*See* 47 C.F.R. § 73.3522), it was necessary in the Site Map *Order* to create a limited amendment opportunity for the purpose of correcting a specific tenderability defect only, *i.e.*, a defective topographic site map. We believe it reasonably clear, given the context in which n.5 appears, that it was intended to preclude amendments to correct *tenderability* defects other than site map amendments.

9. Thereafter, the staff issued the reinstatement letter. Noting that Saxton Steele's application had initially been returned as not sufficient for tender because it failed to include a proper topographic site map, the staff stated:

> Consequently, the Commission has directed the staff to reinstate those applicants whose applications have been returned for failure to comply with the topographic site map requirement, and who have preserved their rights at the various levels of appeal, to afford them one opportunity to cure their defective applications.

Your application, therefore, has been reinstated *nunc pro tunc* for this limited purpose. So that we may perform a new tenderability study as expeditiously as possible, please submit an amendment to your application which includes a topographic site map complying with the specifications of the enclosed *Public Notice*, not later than fifteen days from the date of this letter. No other changes will be permitted by means of this amendment. Failure to respond within the time frame specified will result in the dismissal of your application pursuant to 47 C.F.R. § 73.3568(b).

Again, Saxton Steele contends that this language operated to preclude Saxton Steele's submission of an amendment to cure its acceptability defect. Such an interpretation is both inconsistent with the language in the reinstatement letter and the rules governing the processing of FM broadcasting applications which provide that any application may be amended as of right up until expiration of the thirty day period triggered by a notice of tenderability, provided that such an amendment does not correct a tenderability defect in the underlying application. *See* 47 C.F.R. § 73.3522. Because the Commission's rules generally prohibit the filing of amendments to cure tenderability defects, the *Site Map Order* created a one-time limited exception to the rule and the reinstatement letter implementing the *Site Map Order* properly advised Saxton Steele that no other "changes" (*i.e.*, tenderability changes) would be permitted by their topographic site map amendment. We simply cannot ascribe the different, more restrictive interpretation to this language offered by Saxton Steele. Furthermore, even if such an interpretation were plausible, the subsequent issuance of the December 17, 1986 *Public Notice* superceded the staff's purported directive in the reinstatement letter and under established procedures commenced the thirty day amendment period. We believe Saxton Steele's attempt to ascribe a different meaning to the reinstatement letter is nothing more than a *post hoc* rationalization for its failure to recognize that its application had been found tenderable and that the amendment as of right period was therefore running.[5]

10. Having found no merit in Saxton Steele's arguments, IT IS ORDERED that Saxton Steele's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Applications that fail to comply with any of the elements evaluated in the course of a tenderability study are returned as not sufficient for tender. The rules specifically prohibit the filing of curative amendments to correct tenderability defects after the close of the appropriate filing window. Thus, unless the staff erred in returning an application as not sufficient for tender, such applications are not entitled to *nunc pro tunc* reconsideration.

[2] In view of the fact that the reinstatement letter called for a curative amendment already on file with the Commission, it is apparent that the December 4, 1986 amendment had not yet been associated with Saxton Steele's application.

[3] The issuance of a Public Notice announcing that an application has been tendered for filing commences a 30 day amendment as-of-right period during which applicants may amend their applications to correct defects relating to either the acceptability or grantability of their applications. *See* 47 C.F.R. § 73.3522. Subsequent amendments are only considered upon a showing of good cause for late filing or pursuant to 47 C.F.R. § 1.65 or pursuant to an official Commission request for an amendment.

[4] In light of the dramatic revision in the Commission's FM processing procedures, Saxton Steele's comparison of FM notice procedures with those applicable to the AM service is particularly uncompelling. In promulgating these FM procedures, the Commission explicitly stated that the window filing system was applicable to FM services only, as the system was expressly designed to alleviate the broad range of difficulties peculiar to the FM processing line. *Report and Order* in MM Docket No. 84-750, 58 RR 2d 776, 778 (1985). For this reason, the Bureau rejected this argument when it was raised by Saxton Steele on reconsideration; we find no basis to deviate from this position.

[5] There is no evidence to suggest that Saxton Steele was, in fact, poised to file an amendment curing the short spacing in the 30-day period following the December 17th *Public Notice*, but failed to do so because of its interpretation of the *Site Map Order* and the December 12th reinstatement letter. Had Saxton Steele been in that position, we believe it is reasonable to conclude that, to protect its rights, it would have, and should have, requested reconsideration, clarification or review of the *Site Map Order* and/or the - reinstatement letter and concomitantly filed its amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GOLDEN WEST BROADCASTERS — File No. BPH-851104II

For modification of license for
KMPC-FM, Glendale, California.

MEMORANDUM OPINION AND ORDER

Adopted: January 1, 1989; Released: March 3, 1989

By the Commission:

1. The Commission has before it for consideration a petition for reconsideration filed December 31, 1986, on behalf of Golden West Broadcasters (Golden West), successor in interest to K.U.T.E., Inc. (KUTE) and current licensee of KMPC-FM (formerly KUTE-FM), Glendale, California.[1] This petition seeks reconsideration of the Commission's *Order* denying KUTE's application for review of the Mass Media Bureau's (Bureau) denial of the subject application to increase the effective radiated power (ERP) for KMPC-FM to a level exceeding the maximum allowed for Class B FM facilities. *See K. U. T. E., Inc.*, 1 FCC Rcd 938 (1986).[2] On January 14, 1987, Taxi Productions, Inc. (Taxi), licensee of KJLH-FM, Compton, California, filed an opposition to Golden West's petition for reconsideration arguing that the proposed increase in KMPC-FM's ERP would cause interference to KJLH-FM. However, on July 15, 1988, Taxi formally advised the Commission that, for reasons discussed below, it no longer believes that the proposed modification of KMPC-FM will have a discernible adverse effect upon reception of KJLH-FM's signal and therefore, Taxi has withdrawn its opposition and actively supports grant of the subject petition for reconsideration and underlying application. On August 26, 1988, Par Broadcasting Company (Par), licensee of first adjacent channel station KGMG-FM, Oceanside, California, filed an untimely objection to Golden West's petition for reconsideration. Although Par fails to demonstrate why it did not participate in the earlier stages of this proceeding, we believe that because of the allegations of substantial actual interference, the public interest would be best served by consideration of the matters raised in Par's objection.

BACKGROUND

2. KMPC-FM was originally licensed in 1952 to operate with an ERP of 82 kilowatts and an antenna height above average terrain (HAAT) of 189 meters. Because these facilities exceeded the maximum power and antenna height limitations established for Class B stations in 1962, *See First Report and Order* in Docket No. 14185, 33 FCC 309 (1962), KMPC-FM was "grandfathered" as a superpower Class B station. However, in 1968, an earlier licensee of KMPC-FM, Robert D. Adams, relinquished KMPC-FM's status as a superpower Class B station by filing an application specifying reduced operating parameters *(i.e.*, 640 watts ERP with an antenna HAAT of 872 meters) equivalent to the maximum for a class B facility.[3] Thereafter, Inner City Broadcasting Corporation (Inner City), who had acquired the KMPC-FM license from Mr. Adams in 1979 (BALH-781205EE), filed an application (File No. BPH-790726AO) proposing to increase the station's operating parameters at its present site on Mount Wilson to 10 kilowatts ERP with an antenna HAAT of 846 meters and requesting a waiver of the maximum Class B power and antenna height limitations set forth in 47 C.F.R. §73.211(b). The Chief, FM Branch, Audio Services Division, Mass Media Bureau, denied Inner City's request for waiver and dismissed its application on September 25, 1985.

3. On November 4, 1985, Inner City's successor in interest, KUTE,[4] filed a petition for reconsideration of this decision and also filed the subject application to amend Inner City's proposal to reduce KMPC-FM's operating parameters to a level equivalent to those authorized prior to 1968. Taxi opposed this application. The Chief, Audio Services Division, Mass Media Bureau, denied KUTE's petition for reconsideration and returned the amended application by letter dated March 17, 1986, rejecting KUTE's claims that Adams had involuntarily relinquished KMPC-FM's superpower Class B status and that maximum Class B facilities did not allow KMPC-FM to deliver an adequate signal to Glendale. The Commission affirmed the Bureau's action and denied KUTE's application for review on November 14, 1986. *See K. U. T. E., Inc.*, 1 FCC Rcd 938. KUTE thereafter filed the instant petition for reconsideration.

4. Less than one week after the Commission denied KUTE's application for review, KUTE filed a petition for rule making requesting the substitution of either channel 275A or 279A in lieu of channel 271A at Oxnard, California. This substitution would enable KUTE to move KMPC-FM's transmitter to a site within the Glendale city limits, thereby improving the station's service to its city of license. *See Notice of Proposed Rule Making*, FM Table of Allotments, MM Docket 87-74, 2 FCC Rcd 1958 (Chief, Policy and Rules Division, 1987). KUTE's successor in interest, Golden West, later filed an application (File No. BPH-871029IB) for authority to make the site change contemplated by the rule making. Taxi opposed both the Oxnard channel substitution and Golden West's proposed site relocation, arguing that KMPC-FM's present service to Glendale was adequate and that a move of the KMPC-FM facilities to a site within Glendale would reduce the already substandard spacing between KMPC-FM and KJLH-FM and thus result in substantial interference to KJLH-FM.

5. Thereafter, Golden West and Taxi entered into discussions in an effort to resolve their differences in the various proceedings discussed above. Toward this end, the parties entered into a Settlement Agreement whereby Golden West would obtain a special temporary authorization (STA) to increase its ERP to 2.4 kilowatts at KMPC-FM's licensed site on Mount Wilson so that appropriate tests could be conducted to determine the effect on KJLH-FM of KMPC-FM's operation with increased power. Assuming the test results are acceptable to Taxi, the settlement Agreement ultimately contemplates: (i) withdrawal by Taxi of all pleadings filed before the Commission and the United States Court of Appeals in opposition

to the subject application to increase KMPC-FM's ERP to 2.4 kilowatts; (ii) grant of a construction permit authorizing such a power increase; and (iii) upon finality of the grant of a license to operate KMPC-FM with 2.4 kilowatts, dismissal, with prejudice, of Golden West's application to relocate its transmitter (File No. BPH-871029IB) and notice to the Commission that Golden West is no longer interested in pursuing the Oxnard channel substitution.

6. On May 25, 1988, Golden West was granted an STA to conduct the tests called for in the Settlement Agreement. On June 9, 1988, Golden West advised the Commission that these tests, conducted by representatives for both KJLH-FM and KMPC-FM, revealed that a power increase to 2.4 kilowatts would dramatically improve the quality of KMPC-FM's signal to its community of license, Glendale, but would not have a discernible adverse effect upon the reception of either KJLH-FM or KMPC-FM.[5] Accordingly, as noted in paragraph 1, *supra*, Taxi no longer objects to a power increase for KMPC-FM and, indeed, actively supports grant of the subject application as the only means by which KMPC-FM may overcome its coverage deficiency without harm to KJLH-FM. Taxi therefore has formally withdrawn its opposition to grant of the subject petition for reconsideration and underlying application, withdrawn its comments in MM Docket No. 87-74 opposing the Oxnard channel substitution and has withdrawn its Notice of Intention to Intervene in Case No. 86-1739 before the United States Court of Appeals for the District of Columbia Circuit. Therefore, Golden West requested another STA to operate with 2.4 kilowatts pending the outcome of this proceeding to overcome the severe deficiency in its coverage to Glendale. The Chief, Mass Media Bureau granted this request on July 27, 1988.

7. On August 26, 1988, Par, licensee of KGMG-FM, Oceanside, California, filed a request for revocation of the STA granted Golden West and informal objection to the application for permanent authority to operate with 2.4 kilowatts.[6] Par's request states that the temporary increase in KMPC-FM's power to 2.4 kilowatts has created serious and substantial interference to KGMG-FM. In support of this claim, Par submits the names of eight listeners who have telephoned KGMG-FM to complain of interference. Par also submits statements from two of its employees and another engineer, Steve Broomell, which assert that in certain areas, they are only able to receive KGMG-FM on their car radios on an intermittent basis and attribute this problem to the operation of KMPC-FM. Finally, Par submits two engineering statements from Louis R. du Treil which attest to the existing spacing deficiency between KMPC-FM and KGMG-FM, to the overlap of the predicted contours of these two stations and thus, the potential for interference to KGMG-FM if KMPC-FM is authorized to operate with 2.4 kilowatts. In response, Golden West submits the results of actual field strength measurements conducted in accordance with 47 C.F.R. § 73.314 demonstrating that in the area of predicted overlap of the KMPC-FM and KGMG-FM contours, KMPC-FM's signal strength is below that which would mark the onset of interference. In fact, at 17 of the 24 points measured, Golden West claims that the KMPC-FM signal was so weak that it could not even be measured. Finally, Golden West asserts that the actual field strength measurements indicate that in the Pacific Beach, Ocean Beach and Mission Beach areas, KGMG-FM does receive intermodulation interference from two San Diego stations, KCBQ-FM and KJQY-FM. Par does not dispute the accuracy of Golden West's actual field strength measurements but merely states that as a practical matter, these measurements are meaningless because the antenna types and heights at which the measurements were taken do not represent the typical antenna height or receiver used by the public in their automobiles and homes.

DISCUSSION

8. The instant petition for reconsideration asserts that the Bureau and Commission erred in concluding that KMPC-FM provides an adequate city-grade signal to its community of license pursuant to 47 C.F.R. §73.315. In reaching this conclusion, we relied upon predicted coverage contours computed in accordance with 47 C.F.R. §73.313 which indicate that KMPC-FM provides an adequate city-grade signal (i.e., 70 dBu) to Glendale. Although Golden West has failed to demonstrate that our previous conclusion was erroneous based upon the engineering data before us at that time, we note that since that time, Golden West has conducted actual field strength measurements computed in accordance with 47 C.F.R. §73.314. These measurements, submitted at the request of the Commission as a supplement to the Oxnard channel substitution proceeding, clearly demonstrate that KMPC-FM actually provides a city-grade signal to less than 30% of Glendale. KMPC-FM thus provides a quality of service far below that required by the Commission and contemplated by our rules.

9. The proximity of co-channel and adjacent channel stations or assignments and the coverage requirements of §73.315 restrict the area in which Golden West might relocate the KMPC-FM transmitter. Indeed, a move toward Glendale (such as that proposed in BPH-871029IB) which would improve KMPC-FM's coverage of that community would exacerbate the existing spacing deficiency between KMPC-FM and KJLH-FM and would create a new spacing deficiency to the allocation at Oxnard, California. If Golden West is authorized to increase ERP to 2.4 kilowatts at its present site, Golden West and Taxi maintain that the improved coverage is simply the best that can be achieved without an adverse effect on the operation of KJLH-FM. Golden West also asserts that there will be virtually no change in the reception of KGMG-FM as a result of the requested power increase. (*See* note 5, *supra*). In this regard, we note that in the tests conducted pursuant to the May 25, 1988 STA authorizing a temporary increase in KMPC-FM's power, Taxi and Golden West reported that with an ERP of 2.4 kilowatts, KMPC-FM's signal over Glendale improved dramatically with no discernible adverse effect upon the signal reception of either KJLH-FM or KGMG-FM.

10. Par disputes Golden West's findings in both the tests conducted pursuant to the May 25, 1988 STA and the actual field strength measurements taken in September 1988, claiming that the listener complaints received clearly demonstrate the inaccuracy of these findings as well as the serious and substantial interference caused by an increase in KMPC-FM's power. However, of the eight individuals identified as having complained of interference to KGMG-FM, only one of the complainants has identified the interfering station as KMPC-FM. While it is possible that the interference experienced by these individuals may be related to KMPC-FM's operation, this is not likely the case since the field strength measurements demonstrate that KMPC-FM's signal was so weak

that it could not even be measured in most of the areas in which these individuals reside. Similarly, in all but one of the areas in which Par's employees and Mr. Broomell claim that reception of KGMG-FM on their car radios is intermittent, the actual field strength measurements indicate that KMPC-FM's signal is so weak that it cannot be measured. Furthermore, the unsupported declaration of Mr. Broomell that interference in the San Clemente area is due to the proximity of KMPC-FM's stronger signal is directly controverted by the actual field strength measurements which demonstrate that KMPC-FM's signal is, in fact, weaker than the signal of KGMG-FM in that area. Finally, the engineering statements provided by Par attesting to the potential for interference due to the overlap of the predicted contours for KGMG-FM and KMPC-FM do not present any concerns not already addressed in this proceeding. The predicted overlap of these stations' contours has never been in dispute and it is because of this overlap that Golden West has conducted several tests to measure the *actual* versus *predicted* results of the proposed power increase. Although Par may find the results of these tests meaningless because Golden West did not employ the type and height of receiving apparatus Par deems representative of the equipment used by the public, Par has failed to demonstrate that these tests, conducted in accordance with Commission rules, are either flawed or inaccurate.

11. Given the patent inadequacy of KMPC-FM's existing service to Glendale, the unavailability of a suitable site which would improve the station's coverage, and the fact that no signal degradation will result from the proposed increase in the station's ERP, we believe that the public interest would be best served by waiver of the maximum power and antenna height limitations in this case. In another instance involving an egregious deficiency in city coverage if the maximum power restrictions were adhered to, the Commission held that the "public interest would be served by tipping the balance between our maximum power restrictions and our city coverage requirements in favor of city coverage." *See Communico Atoni Corp.*, 45 RR 2d 1242 (1979). We also wish to note that in authorizing KMPC-FM to operate with facilities exceeding the maximum permitted pursuant to §73.211(b), the station's coverage area will be increased but not so much as to provide Golden West with an advantage over other FM stations in the market or otherwise contravene the policies underlying the rule. *Compare Peoples Broadcasting Corp.*, 41 RR 2d 1046 (B/cast Bur. 1977) (wherein the Chief, Broadcast Bureau, refused to allow applicants for a deleted Indianapolis superpower station to specify facilities in excess of the class B maximum allowed by §73.211(b) and thus afford the new station the unique advantage of substantially greater coverage over other Indianapolis stations).

12. Accordingly, for the reasons stated herein, IT IS ORDERED, that Golden West's petition for reconsideration IS GRANTED, that Taxi's opposition to petition for reconsideration IS DISMISSED, that Par's request for revocation of STA and informal objection IS DENIED. IT IS FURTHER ORDERED that Golden West's application (File No. BPH-851104II) IS REINSTATED and IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The petition for reconsideration was actually filed on behalf of KUTE. However, on December 24, 1986, the Mass Media Bureau approved a *pro forma* assignment of the KMPC-FM license from KUTE to Golden West (File No. BALH-861217GM). This assignment was consummated December 31, 1986, the same day the subject petition for reconsideration was filed.

[2] On December 31, 1986, Golden West also filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit. *KUTE, Inc. v. FCC*, Case No. 86-1739. The Court proceedings have been held in abeyance pending disposition of Golden West's petition for reconsideration before the Commission.

[3] In earlier stages of this proceeding, it was argued that Mr. Adams' relinquishment of superpower class B status was involuntary and, therefore, KMPC's superpower status should be reinstated. The Commission rejected this argument, affirming the Bureau's conclusion that Adams' actions could not be considered "involuntary." In its petition for reconsideration, Golden West has not challenged this aspect of our earlier decision. Therefore, we see no reason to disturb our previous ruling on this matter or to discuss the issue further in this proceeding.

[4] On October 2, 1985, the Bureau granted an application to assign the license for KMPC-FM from Inner City to KUTE (File No. BALH-850816GV). As noted in note 1, *supra*, a subsequent *pro forma* assignment of the KMPC-FM license to Golden West was approved on December 24, 1986.

[5] Golden West also conducted tests to determine whether operation of KMPC-FM with 2.4 kilowatts would adversely effect signal reception of first adjacent channel station KGMG-FM, Oceanside, California. These tests demonstrated that due to the presence of a mountain ridge separating the transmitting facilities of KMPC-FM and KGMG-FM, KMPC-FM's present operation causes no signal degradation in areas now served by KGMG-FM and that the same result obtains when KMPC-FM operates with 2.4 kilowatts.

[6] Golden West filed an opposition to Par's request on September 1, 1988, and Par replied on September 14, 1988. Golden West filed a response to Par's reply on September 16, 1988, and on September 30, 1988, Par filed a supplement to its original request filed August 26, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Requests of 25 large	File Nos. X-1690 - 1694
oceangoing cargo ships for	X-1697 - 1712
exemption from radiotelegraph	X-1715, X-1717
requirements	X-1726 - 1727

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1989; Released: March 3, 1989

By the Chief, Special Services Division:

I. INTRODUCTION

1. The above-captioned requests for exemption from the radiotelegraph requirements of Title III, Part II of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. §§ 351 - 354, and of Chapter IV of the International Convention for Safety of Life at Sea, 1974, TIAS 9700 (Safety Convention), were filed by Exxon Communications Company (Exxon), Mobil Oil Corporation (Mobil), Chevron Shipping Company (Chevron), Keystone Shipping Co. (Keystone), Cove Ventures, Inc., Cove Liberty Corp., and Cove Trading, Inc. (collectively "Cove"). These requests were opposed by the Radio Officers Union and the American Radio Association (ROU/ARA).[1]

2. For reasons discussed below we find that the routes or conditions of the voyages and other circumstances are such as to render it unnecessary to require the ships to comply with the manual Morse code radiotelegraph requirements of the Communications Act or Safety Convention. Therefore, we will grant all the requested exemptions.

II. PROCEDURE

3. Exxon filed motions to strike ROU/ARA filings for untimeliness and lack of authority on November 17 and December 12, 1988, and ROU/ARA opposed these motions. Because the issues raised by ROU/ARA concern safety of life and property at sea and because we would generally examine the same type of issues in any similar exemption request, we will deny Exxon's motions and consider ROU/ARA's arguments.

III. BACKGROUND

4. Section 352(b) of the Communications Act permits the Commission to exempt cargo ships from the traditional manual Morse code telegraphy equipment requirements if in the course of their voyages they do not go more than 150 nautical miles from the nearest land and if the Commission considers that the route or conditions of the voyages or other circumstances are such as to render a radio station unreasonable or unnecessary for the purposes of the Communications Act. Regulation 5 of Chapter IV of the Safety Convention permits exemptions where the maximum distance of the ship from the shore, the length of the voyage, the absence of general navigational hazards, and other conditions affecting safety are such as to render the radiotelegraph station unreasonable or unnecessary. For a fuller discussion of the manual Morse telegraphy requirements, changes in technology and law, and other factors bearing on exemptions *see Requests of 22 large oceangoing cargo ships for exemption from radiotelegraphy requirements*, 3 FCC Rcd 4127 (Spec. Serv. Div. 1988), *aff'd*, 4 FCC Rcd _____ (1989) (*Ship Exemptions*).

5. The exemption requests are for ships that are required by the Safety Convention and the Communications Act to carry manual Morse code telegraphy operators and manual Morse code telegraphy equipment. Their various voyages are within 150 nautical miles of land between Alaska, the West Coast of the 48 contiguous states, Panama, and the U.S. East or Gulf Coast. The ships seeking the exemptions would carry a variety of state of the art equipment for voice and data communications instead of manual Morse code telegraphy equipment. The requests are similar to those recently approved by the Commission. *See Ship Exemptions*, *supra*.

IV. DISCUSSION

6. The voyages covered in the pending exemption requests are similar to the voyages proposed by the ships which were granted exemptions in *Ship Exemptions*, *supra*, that is, between Alaska, the coasts of the 48 contiguous states, and Panama. Each of these ships will carry at least as much radio equipment as required of those ships. In opposing the pending exemption requests, ROU/ARA reiterate arguments made in the earlier proceeding:

a. The Commission lacks statutory authority to grant the exemptions;

b. Granting the exemptions would have an adverse impact on national security;

c. Granting the exemptions would decrease safety of ships at sea.

These arguments were thoroughly discussed and evaluated in the *Ship Exemptions Order*. The Commission concluded that it had authority to grant those exemptions and that they would not in any way adversely impact on maritime safety or national security.

7. Briefly stated, Section 352(b) of the Act permits the Commission to exempt vessels from the radiotelegraph requirements based on, among other things, the route of the voyage. *See American Radio Ass'n v. FCC*, 690 F.2d 334 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). Additionally, the Navy has confirmed that the grant of the exemptions would have no adverse impact on national security. *See* Letter from C.A.H. Trost, Chief of Naval Operations to Chairman, Federal Communications Commission (April 22, 1988). Because the Navy does not

utilize manual Morse code radiotelegraphy for ship-to-ship or ship-to-shore communications there is no interoperability problem.

8. Throughout ROU/ARA's pleadings is the suggestion that granting the exemptions would compromise safety on the ground that radiotelegraphy is superior to any other system for distress and safety communications. The Commission rejected that argument in 1982 when it adopted a general exemption, 47 C.F.R. § 80.836(c), for ships with specified state of the art equipment on voyages along the coasts of the 48 contiguous states. *Amendment of Part 83*, 89 FCC 2d 40, *passim* (1982), *aff'd sub nom. American Radio Ass'n v. FCC*, *supra*. The argument is even less valid today. The systems to be carried by these ships provide multiple pathways for distress and safety communications, and this redundancy increases the probability that vital messages will get through. Additionally, because knowledge of Morse code is not required to operate the alternative communications equipment, almost any person aboard ship could be trained to operate these systems, providing greater flexibility than manual Morse radiotelegraphy in distress situations. Accordingly, as in the previous exemptions, there is no merit to ROU/ARA's arguments.

9. We will also comment on a few points relating to the specific exemption requests before us at this time. ROU/ARA suggest that an increased possibility of danger argues against granting exemptions. They state that the routing along the Yucatan peninsula is dangerous within 150 miles of land because of numerous shoals and oil platforms. ROU/ARA Reply (Exxon), 13. They state that the likelihood of a distress situation involving the COVE LEADER is increased because it is 30 years old. ROU/ARA Opp. (Cove), 15. These arguments miss the point of the Commission's policy regarding exemptions from the radiotelegraphy requirements. The Commission's adoption of the general exemption rule and its actions on exemption requests like those at issue were not based on an expected absence of any possible danger on the voyages. Rather, advances in technology made other radio equipment available equal to or superior to radiotelegraphy. The possibility that the ships requesting exemptions here may encounter distress situations is not a sound argument against granting the exemptions because the equipment they will carry & will provide communications reliability equal to or superior to radiotelegraphy.

10. Further, concerning the specific routes to be followed, the route to Alaska is along the coast of Canada, and all the proposed voyages are confined to North and Central America. It is significant to note that Canada provides an exemption for ships of 1600 gross tons and upward if fitted with one VHF, one MF, and one MF-HF radiotelephone installation for voyages north of 17 degrees 15 minutes North Latitude within 600 nautical miles of the American continent. 1978 Can. Gaz. Pt. II, 992, *as amended*, 1983 Can. Gaz. Pt. II, 1498. That covers most of the coast of Mexico and northward. In addition, Canada has filed equivalency statements with the International Maritime Organization (IMO), under which a ship can fit a ship earth station satellite terminal in lieu of its main radiotelegraph installation for any voyage. IMO doc. SLS.14/Circ. 30, January 18, 1983; or in lieu of any radiotelegraph installation for "occasional" international voyages, IMO doc. SLS.14/Circ. 8, March 9, 1981. While that action on the part of another administration is not controlling for our actions, it adds to our confidence that the voyages can be conducted safely along the proposed routes.

11. ROU/ARA also argue that reliance on 2182 kHz is unwise because of poor propagation, alleged lack of coverage of coast stations and possible language barriers. This subject also was discussed previously. *See Ship Exemptions*, 4129-30. It is important to stress that the ships will carry a variety of equipment and not rely solely on 2182 kHz. The redundancy of equipment and alternate pathways will provide reliability at least as great as that obtained by relying on radiotelegraphy.

12. ROU/ARA question whether Cove's voyages will be within 150 miles of land, stating that the chart attached to its request shows voyages beyond the limit. ROU/ARA Opp. (Cove), 9. Cove answered this satisfactorily by reiterating its intent to stay within the limit, stating that any appearance to the contrary is due to imprecision inherent in depicting the course on small scale charts. Cove Reply, Garbis Statement, 1.

V. DECISION

13. In light of the discussion above, after careful consideration of the requests and responsive pleadings, we will grant the requested exemptions with the conditions set forth in para. 15 *infra*.

14. IT IS ORDERED that Exxon's motions to strike ARE DENIED.

15. IT IS FURTHER ORDERED that pursuant to 47 U.S.C. § 352(b), the U.S. cargo ships EXXON BALTIMORE, EXXON BATON ROUGE, EXXON BAYTOWN, EXXON BENICIA, EXXON BOSTON, EXXON LEXINGTON, EXXON LONG BEACH, EXXON NORTH SLOPE, EXXON SAN FRANCISCO, EXXON VALDEZ, EXXON WASHINGTON, EXXON YORKTOWN, EXXON JAMESTOWN, EXXON PRINCETON, CHEVRON ARIZONA, CHEVRON COLORADO, CHEVRON LOUISIANA, CHEVRON OREGON, CHEVRON WASHINGTON, SYOSSET, COVE LEADER, COVE LIBERTY, COVE TRADER, ATIGUN PASS, AND KEYSTONE CANYON ARE EXEMPTED from the radiotelegraph station requirements of 47 U.S.C. Title III, Part II and of Chapter IV of the Safety Convention for an indefinite period when navigated on voyages not more than 150 nautical miles from the nearest land. Each ship's exemption is subject to the following conditions:

a. the ship must have a radiotelephone installation that complies with Subpart R of Part 80 of the Commission's Rules, 47 C.F.R. Part 80, Subpart R;

b. in addition to the main power source the ship must have an emergency power source meeting all applicable rules and regulations of the U.S. Coast Guard, and a reserve power source that complies with 47 C.F.R. § 80.860;

c. the ship must have a satellite ship earth station providing both voice and telex;

d. the ship must have narrow-band direct-printing equipment including SITOR;

e. the ship must have a HF single sideband radiotelephone with voice channels capable of operating on the frequencies listed in 47 C.F.R. §

80.369(b) for distress and safety communications and at least four of the AMVER HF duplex channels;

f. the ship must have a separate 2182 kHz radiotelephone distress frequency watch receiver and a radiotelephone alarm signal generator;

g. the ship must have at least two VHF transceivers;

h. the ship must have a 500 kHz auto alarm receiver and the capability of relaying the distress messages received to shore via one of the systems listed above;

i. the ship must participate in the AMVER system when on voyages of more than 24 hours;

j. the ship, while at sea, must have the capability to operate and maintain all the ship systems used for distress and safety in accordance with 47 C.F.R. §§ 80.159(c) and 80.169;

k. all equipment listed in c., d., and h. above must be capable of being powered by the main and emergency power sources;

l. all equipment listed in e., f., and g. above must be capable of being powered by the main, emergency, and reserve power sources;

m. the ship must maintain a continuous watch on 2182 kHz and 156.8 MHz when navigated;

n. the ship must have a current cargo ship Safety Certificate issued by the Commission; and

o. all of the conditions on which the exemption is granted remain the same.

16. Any of these exemptions may be terminated at any time without hearing if, in the Commission's discretion, the need for such action arises.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

FOOTNOTE

[1] The ROU and ARA are labor organizations that represent radio officers on board U.S. flag ships.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. No. 9 — Transmittal Nos. 1422 and 1452

Network Protection Capability

ORDER

Adopted: February 8, 1989; Released: February 17, 1989

By the Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) proposes by Transmittal No. 1422 to offer an emergency restoral capability for its Accunet T45Mbps and T1.5Mbps interoffice channels, styled Network Protection Capability (NPC), to be provided over geographically diverse fiber optic facilities.[1] NPC charges consist of a nonrecurring charge for initial establishment of the diverse routing and a monthly charge for the standby circuit's continuing availability, the latter set at 15 percent of the undiscounted monthly rate for the circuit in question.

2. Williams Telecommunications Group, Inc. (WTG), which provides interstate services and facilities, petitioned to reject or suspend the AT&T proposal. WTG asserts that the substantial rate discount proposed for NPC constitutes the imposition of dramatically different terms and conditions for functionally equivalent services, in violation of the Communications Act and judicial decisions. WTG Petition at 2-3. Moreover, WTG contends, AT&T has failed to show that its divergent pricing practices meet either the standards established by the private line rate structure and volume discount practices guidelines,[2] or the Commission's net revenue test. *Id.* at 4-5. Further, WTG argues, the NPC filing is analogous to AT&T's recent Tariff 15 filing,[3] the lawfulness of which turns upon the accuracy of AT&T demand estimates and its ability to satisfy the net revenue test. *Id.* at 7-8. Finally, WTG asserts the revisions may involve a rebate illegal under Section 203(c)(2) of the Act.

3. AT&T replies that WTG's contentions are based on a mistaken understanding of NPC as a discrete, available channel when the offering instead constitutes only the assured availability of alternate facilities and an automatic cutover to them if the primary facility fails. AT&T notes that existing primary circuit arrangements include the provision of restoral facilities as available, but without a guaranteed recovery time; the incremental cost of NPC reflects the assurance both of availability and of the specified restoral time, with the alternate circuit implemented by a protection switch at each end of the interoffice channel. AT&T Reply at 2-3.

4. AT&T adds that recent Commission decisions cited by WTG to support investigation are not relevant to NPC because it is a general offering rather than one directed to an individual customer, and does not present rebate issues. *Id.* at 4. AT&T asserts further that it explained the basis for its demand projections fully in the Description and Justification accompanying the tariff filing, and that basing such projections on actual customer requests and a customer survey is consistent with the Commission's decisions. Finally, as to its projected "revenue less cost" analysis, AT&T notes that first-year costs include start-up expenses, while later years are unburdened by these expenses, and that NPC will be profitable in 1990.

5. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 1422 and 1452 and the WTG and AT&T pleadings. We conclude that AT&T's proposal is not patently unlawful as to warrant rejection, nor does it warrant investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or suspend AT&T Communications Transmittal No. 1422, filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Transmittal No. 1422 is scheduled to become effective February 19, 1989. Transmittal No. 1452 provides an example of the calculation of NPC charges, added to AT&T's original proposal at Tariff Division staff request.

[2] 97 FCC 2d 923, 924 (1984).

[3] AT&T Communications, Competitive Pricing Plans (Holiday), CC Docket No. 88-471, FCC 88-299 released Sept. 20, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72

In the Matter of

MTS and WATS Market Structure

Amendment of Part 69 of the
Commission's Rules for Recovery of
Equal Access Costs

REPORT AND ORDER

Adopted: January 18, 1989; Released: February 17, 1989

By the Commission:

I. INTRODUCTION

A. Summary

1. In this Order we modify our Part 69 access charge rules, effective June 1, 1989, to provide for the optional use of a separate rate element in the recovery of equal access (EA) costs. Under the revised rules, local exchange carriers (LECs) will be allowed to recover EA costs through the Local Switching (LS) rate element or a separate EA rate element. LECs implementing a separate rate element to recover EA costs will be permitted to charge access customers a flat monthly fee applicable either to all Feature Group D (FGD) trunks or to all presubscribed EA lines. Use of the new rate element will be restricted to recovery of EA costs as defined for separations purposes. These rule changes generally codify the status quo in which the Bell Operating Companies (BOCs) as well as a limited number of independent telephone companies have been permitted to recover EA costs through a separate rate element pursuant to waivers of the existing rules.

B. BACKGROUND

2. For several years, the larger LECs have been engaged in an ongoing program of facility modification to allow them to provide all interexchange carriers (IXCs) and other access users with access that is equal in type and quality to that provided to the American Telephone and Telegraph Company (AT&T). The Bell Operating Companies (BOCs) are required to implement equal access pursuant to the *Modification of Final Judgment (MFJ)* in *United States* v. *American Telelephone and Telegraph Co.*[1] GTE Corporation (GTE) is subject to similar court mandated equal access implementation requirements stemming from its acquisition of Southern Pacific Communications Company (SPCC) and Southern Pacific Satellite Company (SPSC).[2] The equal access obligations of the other independent telephone companies were established in Phase III of this Commission's *MTS and WATS Market Structure* proceeding, CC Docket No. 78-72. [3]

3. As of December 31, 1987, the BOCs had converted 84.2 percent of their total lines to provide equal access.[4] The BOCs are expected to have converted 91.8 percent of their lines by December 31, 1988.[5] The individual holding company conversion rates as of December 1987, ranged from 93.5 percent for Pacific Telesis to 67.0 percent for NYNEX.[6] GTE had converted 71.2 percent of its lines to equal access as of September 30, 1987, and is expected to have converted 79.7 percent by the end of 1988.[7] Many of the other large independent telephone companies have also converted a major portion of their lines to equal access.[8] However, many of the smaller independent telephone companies serving sparsely populated areas are implementing equal access at a much slower pace.[9]

4. The existing access charge rules do not establish a separate rate element to recover the costs of implementing equal access. Instead, the Part 69 apportionment rules assign equal access investment and expense to the Local Switching element.[10] However, pursuant to waivers granted by the Common Carrier Bureau and this Commission, all of the BOCs and several of the independent telephone companies currently use a separate rate element for recovery of EA costs assigned to the interstate jurisdiction.[11] In granting these waivers, the Bureau and this Commission allowed the use of two distinct EA rate structures -- a flat charge on each presubscribed or equal access subscriber line,[12] and a flat charge on each FGD trunk.[13] The New York Telephone Company and New England Telephone Company (NYNEX), Mountain Bell, Northwestern Bell and Pacific Northwest Bell (US West) and the BellSouth Telephone Companies (BellSouth) use a charge on each equal access or presubscribed line,[14] while the Bell Atlantic Telephone Companies (Bell Atlantic), Pacific Bell (Pacific), Southwestern Bell Telephone Company (Southwestern Bell) and the Ameritech Operating Companies (Ameritech) use a charge applicable to FGD trunks.[15] Cincinnati Bell Telephone Company (Cincinnati Bell) and Rochester Telephone Corporation (Rochester) also have separate EA rate elements.[16] However, most of the independent telephone companies have not chosen to implement a separate EA rate element. For example, GTE, the United Telephone System (United),[17] Contel Corporation (Contel), and Centel Corporation (Centel) recover EA costs through the existing access elements described in the Part 69 rules.

5. Each company's interstate EA revenue requirement is determined through specific accounting and jurisdictional separations procedures applicable to these expenditures.[18] This Commission established an eight year amortization period, ending December 31, 1993,[19] for the recovery of EA expense items in light of the large portion of EA expenditures that would be categorized as expense items for accounting purposes.[20] Absent this requirement, such expenses would have been recovered in the year incurred, producing significant fluctuations in the revenue requirements associated with equal access. At the same time, we denied requests by certain of the BOCs for authority to use shortened depreciation lives for recovery of EA capital investment.[21] We also adopted jurisdictional separations procedures applicable to EA costs,[22] establishing a restrictive definition of EA costs,[23] and allocating EA investment and expense between the federal and state jurisdictions based on equal access minutes of use.[24]

II. THE NOTICE

6. This Commission instituted proceedings in January 1987 to consider the establishment of permanent procedures for the recovery of EA costs.[25] We stated that indefinite continuation of the existing waivers appeared to be undesirable, and we tentatively concluded that we should either establish a separate EA rate element in the access charge rules or terminate the existing waivers. We also tentatively concluded that if a separate EA rate element were established, that element should recover EA costs as defined for separations purposes. The Notice initiating this proceeding invited parties to comment on whether a separate EA rate element should be established, and if so, whether EA costs should be recovered on a usage sensitive or a flat rate basis. It also sought comment on whether a flat charge should be assessed on the basis of presubscribed access lines or trunks, and, in the case of a per trunk charge, whether the charge should apply to all Feature Group A (FGA) lines and all trunks, or only to FGD trunks. Finally, we asked carriers to submit data reflecting the rate effects of the various proposals.[26] Comments in response to the Notice were filed on March 17, 1987,[27] and replies were filed on April 1, 1987.[28]

III. ISSUES

A. Introduction

7. As the discussion above indicates, this proceeding encompasses two basic issues: (1) whether a separate EA rate element should be permitted or required in the Part 69 rules; and (2) if so, how this rate element should be structured. The rate structure issue in turn includes the question of: (a) whether a separate EA rate element should take the form of a usage sensitive charge, or a flat charge applicable to equal access lines or IXC trunks; and (b) what traffic or trunks should be subject to the charge. A final issue concerns the definition of the costs to be recovered through a separate rate element. These issues are discussed separately below.

B. Separate Rate Element

1. Positions of the Parties

8. The BOCs strongly urge us to allow continued use of a separate rate element for recovery of EA costs, although they state that this approach should be optional. Ameritech and BellSouth argue that a separate rate element is the most appropriate means of recovering EA costs, and urge us to allow this approach. However, they take the position that a separate rate element should not be required.[29] NYNEX and US West urge us to change the existing rules to permit use of a separate rate element or allow continuation of the existing waivers.[30] Bell Atlantic argues that we should permit LECs to continue to use the present means of recovering EA costs.[31] Southwestern Bell urges this Commission to continue the existing waivers with a termination date of January 1, 1994.[32] Pacific supports adoption of provisions for a separate EA rate element in the Part 69 access rules with a sunset date of January 1, 1994.[33]

9. The BOCs emphasize that use of a separate rate element facilitates the tracking of EA cost recovery for purposes of the *MFJ* guarantee clause.[34] Several of the BOCs also argue that a separate rate element will allow recovery of EA costs from those benefitting most directly from conversion.[35] Others note that a separate rate element will help to avoid fluctuations in, or distortion of, other access rates.[36] In addition, several of the BOCs note that their use of separate rate elements for the past several years has not caused any problems, and they emphasize the administrative burdens involved in changing the current method of EA cost recovery.[37] A number of the BOCs also filed data showing the effect of recovering EA costs through a separate rate element.[38]

10. The independent telephone companies express differing views concerning use of a separate rate element. Rochester supports implementation of a separate rate element, arguing that this approach is best suited to ensuring recovery of EA costs from the beneficiaries of EA conversion.[39] SNET emphasizes the need for flexibility, taking the position that this Commission should modify the rules to permit the use of either a separate EA rate element or the current Part 69 procedures.[40] Contel also urges flexibility to permit the use of a separate EA rate element by the BOCs while allowing the smaller companies to continue use of the current Part 69 rate elements.[41] GTE urges us to retain the existing rules, emphasizing the administrative burdens of implementing a separate rate element.[42] Cincinnati Bell states that a separate rate element is unnecessary, and argues that this approach would run counter to the trend toward simplification of the separations and access rules.[43]

11. USTA opposes measures to incorporate a separate EA rate element as a permanent part of the access rules. Instead, it urges retention of the existing rules with waivers to allow use of a separate rate element.[44] NECA argues that all LECs should have the option of using a separate EA rate element or the existing procedures.[45]

12. The interexchange carrier comments in this proceeding express differing views on the need for a separate rate element. AT&T states that it does not object to measures allowing use of a separate rate element on an optional basis, noting that this may facilitate tracking of EA cost recovery.[46] MCI argues that EA costs should be recovered through the existing Local Switching charges or a separate usage sensitive rate element.[47] Teltec argues that EA is part of the overall network design, and takes the position that the costs involved should not be singled out for separate treatment. It contends that these costs should be recovered through the existing rate elements.[48]

13. Arizona and New York, the two states participating in this proceeding, both advocate measures to allow use of a separate rate element for recovery of EA costs.[49] In support of this position, they argue that use of a separate rate element facilitates tracking of EA expenditures and cost recovery.[50]

2. Discussion

14. We conclude that Part 69 of the Commission's rules should be amended to provide for the optional use of a separate rate element for the recovery of EA costs.[51] LECs which do not wish to implement a separate EA rate element would continue to reflect these costs in the Local Switching element. As previously indicated, these rule changes generally serve to codify the status quo under which the BOCs and certain independent telephone companies have implemented a separate EA rate element pursuant to waivers of the existing rules while the remaining LECs include these costs in the revenue requirement for the Local Switching element. The current approach

appears to have worked well, allowing the LECs flexibility and avoiding the imposition of unnecessary administrative burdens. There is also substantial support in the record for an approach that permits, but does not require, use of a separate rate element. The BOCs urge us to allow continued use of a separate rate element on an optional basis, and most of the independent telephone companies either urge a flexible approach providing for optional use of a separate rate element, or oppose rule changes providing for such a rate element. Furthermore, none of the participating interexchange carriers (IXCs) advocate rule changes mandating a separate rate element for all LECs.

15. While we recognize that use of a separate EA rate element results in some additional precision in access charge revenue recovery,[52] we do not think this additional precision is sufficient to support imposing a requirement for a separate rate element. Under the present approach, which permits, but does not require, use of a separate rate element, all the BOCs and some of the independents have in fact implemented such a rate element. These carriers account for approximately 80 percent of the nation's access lines and an even greater percentage of the lines converted to equal access. Thus, as a practical matter, mandating a separate rate element would only affect the recovery of a small percentage of equal access costs.[53] Second, any additional precision in access revenue recovery is unlikely to have a significant effect on end user rates for switched interstate services which generally involve a high degree of cost averaging.[54] Mandatory use of such an approach would also involve the imposition of administrative burdens on the LECs, and run counter to our efforts to simplify the access charge rules to the extent possible. These factors combined with the absence of any significant problems under the present approach and the lack of strong support for a mandatory EA rate element by the interexchange carriers (IXCs), other access customers, or end users leads us to conclude that the potential for increased precision in access cost recovery does not warrant rule changes requiring use of a separate EA rate element.[55]

C. Rate Structure

1. Positions of the Parties

16. The BOCs express a variety of views concerning the appropriate structure for a separate EA rate element, although they generally oppose prescription of a single approach. Ameritech supports a usage sensitive EA charge applicable to all premium access traffic (all FGC and D minutes, as well as FGA and B minutes in converted offices), arguing that usage is a good measure of the benefits that carriers and customers receive from the implementation of equal access.[56] Pacific argues that there are advantages to a usage sensitive rate structure for recovery of EA costs, stating that it would not oppose adoption of such a rate structure, although it currently uses a flat rate approach. Pacific recommends that a usage sensitive EA charge apply to all traffic.[57]

17. NYNEX supports flexibility in the recovery of EA costs, but joins US West in strongly advocating use of a flat rate charge on each presubscribed access line.[58] In support of this position, both companies state that EA costs are largely non-traffic sensitive. Accordingly, they contend that this approach best ensures cost recovery from the beneficiaries of EA implementation.[59] They also claim a usage sensitive EA rate structure could create increased bypass incentives.[60] BellSouth emphasizes the benefits of flexibility and urges us to permit a variety of rate structures. If a single approach is to be mandated, BellSouth advocates use of a flat charge on presubscribed access lines for many of the reasons cited by NYNEX and US West. It states that a usage sensitive charge applicable to all traffic would be the second best rate structure.[61]

18. Bell Atlantic opposes prescription of a single rate structure for the EA element, and urges this Commission to permit the LECs to continue recovering EA costs as they do at present. It argues that there is no reason to impose the administrative costs of implementing a new rate structure on the LECs.[62] Southwestern Bell opposes adoption of a single EA rate structure, arguing that the costs of standardization outweigh the benefits. If this Commission mandates a uniform approach, Southwestern urges use of a flat charge per FGD trunk since the users of FGD are the primary beneficiaries of equal access.[63]

19. The independent telephone companies also express a variety of views on these issues. GTE supports continued use of the existing rate elements, but favors a flat charge applicable to all IXC lines and trunks (FGA, B, and D) in converted offices if a separate rate element is established. It argues that this approach will avoid the creation of incentives for use of FGB by competitive carriers in converted offices when FGB can perform the same functions as FGD.[64] SNET supports use of a flat rate charge if this Commission authorizes a separate rate element on the ground that EA costs are fixed, rather than usage sensitive.[65] Rochester advocates use of a flat charge applicable to presubscribed access lines arguing that EA costs are a function of the number of lines involved.[66] Contel supports flexibility in the recovery of these costs.[67] USTA advocates allowing the LECs to use the EA rate structures that they currently have in effect.[68]

20. AT&T favors a uniform recovery mechanism based on usage or IXC access trunks, arguing that any such charge should apply to all usage or to all trunks and FGA lines. AT&T strongly opposes use of a flat charge on presubscribed access lines as a means of recovering EA costs from the IXCs on the ground that this rate structure creates a disincentive for the provision of service to low volume users.[69] MCI supports usage sensitive recovery of EA costs, either through the charges for local switching paid by all switched access traffic or through a separate usage sensitive rate element applicable to FGD traffic. MCI contends that the LECs are the primary beneficiaries of FGD for intraLATA calling, and argues that they are not assessed EA charges under the current flat rate structure. It contends that a usage sensitive EA rate element will not generate significant pressure for bypass, among other things, because the revenue requirement involved is relatively small compared to that for all TS rate elements.[70] Teltec argues that, if a separate EA rate element is used, it should be structured as a flat charge on all premium access trunks (FGC and D).[71]

21. Arizona and New York support different rate structures for the recovery of EA costs. Arizona advocates a usage sensitive charge applicable to FGD traffic.[72] New York argues that NYNEX should be allowed to use its current flat rate charge on presubscribed access lines for the recovery of EA costs, although it states that this Commission need not mandate this approach for all LECs.[73]

2. Discussion

22. Commenting parties suggest three rate structure alternatives for recovery of EA costs from access users through a separate charge: (1) a usage sensitive per minute charge; (2) a flat charge on each trunk; and (3) a flat charge on presubscribed EA lines. Based on the record in this proceeding and our experience with the separate EA rate elements currently in effect, we agree with those commenters who contend that the LECs choosing to implement a separate EA rate element should be given some flexibility concerning the rate structure employed. However, we conclude that LEC rate structure flexibility in this area must be circumscribed to avoid unnecessarily complicating review of these filings by interested parties and the Commission staff. We also believe that any optional EA rate element should be structured, insofar as possible, to improve the targeting of EA cost recovery by imposing charges only on access customers using EA.[74] Accordingly, we will allow use of either a flat rate monthly charge per presubscribed EA line[75] or a flat monthly charge per FGD trunk. Both of these rate structures are currently in use pursuant to the Part 69 waivers,[76] and appear from our experience to be reasonable.

23. AT&T opposes use of a flat charge per presubscribed EA line, with AT&T, MCI and Teltec arguing that this option creates a disincentive to serving low volume toll users. In particular, AT&T states that many of its customers' interstate toll billings will not cover the EA per line charge, forcing AT&T to recover these costs from its high volume business customers.[77] Other parties strongly defend use of this rate structure. While the effect of this approach on the IXCs will vary depending on their customers' calling volumes, we believe that it is a reasonable means of recovering this limited amount of costs and should be permitted. This approach has been in use by a number of the BOCs for several years without creating any apparent problems. As a number of parties note, this approach is also more consistent with the apparently NTS nature of EA implementation costs[78] than the other options, and will minimize bypass incentives. In addition, this Commission has recently used this type of rate structure in access charge rules for recovery of Universal Service Fund and Lifeline costs.[79]

24. We also conclude that use of a per trunk charge should continue to be allowed. A number of the commenting parties strongly support this approach, and it appears to be reasonable. Like the per presubscribed line approach, it has been in use for some time pursuant to the Part 69 waivers without creating any apparent problems. Certain parties criticized use of a per trunk charge on the ground that EA costs are NTS, and therefore vary with the number of presubscribed lines. We agree that the costs of EA implementation appear to be NTS in nature, and that it is generally desirable to use cost recovery mechanisms that reflect cost causation. However, EA costs are allocated between the jurisdictions based on a usage factor, and, thus, the level of the interstate allocation reflects traffic levels to some extent. Because of that and because of our experience with the per trunk approach, we do not believe that such a rate structure should be ruled out simply because the total charges paid by an IXC, in part, reflect traffic levels.[80]

25. While we are allowing the LECs some flexibility in implementing separate EA rate elements, we must weigh the benefits of any additional flexibility against the increased administrative burdens involved in review of these filings by interested parties and the Commission staff. We believe that any benefits of adding a per minute rate structure, not currently used by any LEC, fail to outweigh the administrative burdens involved. Nor is a per minute charge sufficiently desirable to warrant the administrative burdens that would result from its use in lieu of either of the rate structures presently permitted pursuant to the waivers. Elimination of one of the present rate structures permitted for a separate EA charge would require the LECs using that method to implement a different rate structure for their separate EA charge or to eliminate use of a separate rate element altogether.[81] As a result, we conclude that a separate per minute EA charge should not be provided for in the Commission's rules. The two options which we are allowing should provide the LECs with ample rate structure flexibility while avoiding excess administrative burdens for regulatory review, or the need for changes in the existing tariffs containing separate EA rate elements.

26. As indicated above, when a LEC chooses to implement a separate EA rate element and incur the resulting additional administrative costs, we believe that the new EA rate element should be structured to improve the targeting of access cost recovery to the extent possible. This requires that the application of the separate rate element be limited to presubscribed EA lines or FGD trunks.[82] Applying a separate EA rate element to all switched access traffic regardless of whether it uses EA functionalities would eliminate the increased precision in cost recovery available through use of a separate rate element.[83] In fact, unless a "non-premium" discount were applied to the EA rate element, this approach would impose more EA costs on competitive entrants and others using non-EA services than the existing TS rate structure. While some of the parties in this proceeding advocate application of a separate rate element to FGA lines and FGB trunks in converted offices, we do not believe that this is desirable because it would impose EA costs on access customers that do not use EA,[84] a result that we believe should be avoided at least when a separate rate element is used.[85] Although this will increase any rate differential between FGA and B and FGD in EA offices, it should not affect the use of FGD as some commenting parties contend. We do not believe that this differential will produce untoward results in light of the importance of IXC participation in the end user presubscription process, which is not available with FGA and B. We note that the existing separate EA rate elements are not currently applied to FGA or B and that this does not appear to have resulted in any significant problems. As a result, we will limit application of the per line charge to presubscribed EA lines, and restrict the per trunk charge to FGD trunks.

D. Definition of Equal Access Costs

27. The Notice in this proceeding states that if a separate EA rate element is authorized, it should be designed to recover EA costs as defined for separations purposes. None of the parties to this proceeding oppose use of this definition.[86] Given the administrative simplicity of using the separations definition of EA costs for access purposes, and the lack of opposition to our proposal, we will use this definition in establishing the costs to be recovered by a separate EA rate element.

IV. CONCLUSION

28. We conclude that the Commission's rules should be revised to provide for optional use of a separate EA rate element, although we do not believe that the benefits of this approach are sufficient to warrant making this approach mandatory. We also conclude that the LECs choosing to implement a separate EA rate element should be given a degree of rate structure flexibility in this area, although we believe that the separate rate element should be structured so as to improve the targeting of access cost recovery to the extent possible.[87]

V. ORDERING CLAUSE

29. Accordingly IT IS ORDERED, that the revisions to Part 69 of the Commission's rules shown in the Appendix below ARE ADOPTED, effective June 1, 1989.[88]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.2 is amended by adding the following definition to read as follows:

Section 69.2 Definitions.

* * * * *

(nn) "Equal access investment and equal access expenses" mean equal access investment and expenses as defined for purposes of the Part 36 separations rules.

3. Section 69.4 is amended by revising paragraph (b) and adding new paragraph (d) to read as follows:

Section 69.4 Charges to be filed.

* * * * *

(b) Except as provided in Subpart C of this Part and in paragraphs 69.4 (c) and (d), * * *

* * * * *

(d) For the period June 1, 1988 through December 31, 1993, all telephone companies may implement a separate carrier's carrier tariff charge for an Equal Access element. Effective January 1, 1994, all telephone companies shall eliminate separate carrier's carrier tariff charges for an Equal Access element.

4. Part 69 is amended by adding a new Section 69.107 to read as follows:

69.107 Equal access.

(a) A monthly charge that is expressed in dollars and cents either per Feature Group D trunk or per presubscribed equal access line shall be assessed by telephone companies that implement an Equal Access element as provided in paragraph 69.4(d) upon all interexchange carriers for either the interstate and foreign Feature Group D access service trunks the interexchange carrier uses or the presubscribed equal access lines the carrier serves.

(b) A monthly charge per Feature Group D trunk shall be computed by dividing the projected annual revenue requirement for the Equal Access element by twelve times the projected annual average number of interstate and foreign Feature Group D access service trunks.

(c) A monthly charge per presubscribed equal access line shall be computed by dividing the projected annual revenue requirement for the Equal Access element by twelve times the projected annual average number of presubscribed equal access lines.

5. Section 69.308 is revised to read as follows:

69.308 Equal access equipment.

(a) Equal Access investment shall be assigned to the Local Switching element unless the telephone company chooses to implement a separate Equal Access element as provided in paragraph 69.4 (d) in which case Equal Access investment shall be assigned to the Equal Access element.

6. Section 69.410 is revised to read as follows:

69.410 Equal access expenses.

(a) Equal Access expenses shall be assigned to the Local Switching element unless the telephone company chooses to implement a separate Equal Access element as provided in paragraph 69.4 (d) in which case Equal Access expenses shall be assigned to the Equal Access element.

FOOTNOTES

[1] 552 F. Supp 113 at 232-3 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[2] United States v. GTE Corp., 603 F. Supp. 730, 744 (D.D.C. 1984).

[3] 100 FCC 2d 860 (1985), *recon. denied* FCC 86-4, released January 8, 1986. *See also* Implementation of Equal Access by the Southern New England Telephone Company (*SNET Order*), 2

FCC Rcd 2312, released April 22, 1987; Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico (*Puerto Rico Order*), 2 FCC Rcd 6600 (1987), *reconsideration pending*.

[4] News Release, "FCC Releases Data on Equal Access Conversions" (*1988 EA News Release*), Mimeo No. 2880 at Table I, released May 9, 1988.

[5] *Id.* at Table II.

[6] *Id.* at Table I.

[7] AT&T Tariff Review Plan Updated Roll-Up, DMD-2, Switched Access Demand-Lines, Lines 260 and 320, dated October 26, 1987.

[8] News Release, "FCC Releases Data on Equal Access Conversions" (*1986 EA News Release*), Mimeo No. 1291 at Table III, released December 31, 1986; *See also* AT&T Tariff Review Plan Updated Roll-Up, DMD-2, Switched Access Demand-Lines, Lines 260 and 320, dated October 26, 1987.

[9] The *Phase III* Order in CC Docket No. 78-72 requires that the non-GTE independent telephone companies convert end offices equipped with stored program control (SPC) switches to equal access within three years of a reasonable request for conversion. Absent a request, such offices are to be converted as soon as practicable in light of capital constraints and local business conditions. These independent companies are not generally required to convert end offices equipped with electromechanical switches according to a specific schedule regardless of whether conversion is requested. 100 FCC 2d 860, 875 (1985). There are several exceptions to this exemption, however. *See SNET Order* and *Puerto Rico Order supra* note 3.

[10] *See* Sections 69.308 and 69.410 of the Commission's Rules. Effective January 1, 1988, the Local Switching element replaced the prior end office elements. The revised apportionment rules specifically assign all equal access costs to this element. Amendment of Part 69, CC Docket No. 87-113, 2 FCC Rcd 6447, paras. 61-91 (1987), *recon.*, FCC 88-400, released December 12, 1988.

[11] *See e.g.*, New England and New York Telephone Companies, Mimeo No. 2636, released February 20, 1985 (*NYNEX Order*); Chesapeake and Potomac Telephone Companies, Mimeo No. 3375, released April 3, 1985 (*Bell Atlantic Order*); Southern Bell and South Central Bell Telephone Companies, Mimeo No. 5015, released June 11, 1985; Mountain States Telephone and Telegraph Company, Mimeo No. 5548, released July 3, 1985; Southwestern Bell Telephone Company, Mimeo No. 6157, released August 6, 1985; Petitions for Waiver Concerning Tariff Filings, Mimeo No. 5007 at paras. 28-32, released June 7, 1985; Petitions for Recovery of Equal Access and Network Reconfiguration Costs, FCC 85-628 at para. 35, released December 9, 1985. All of the tariff filings made pursuant to these waivers were set for investigation and made subject to an accounting order. Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, 1 FCC Rcd 158 (1986). This Commission recently concluded that investigation, finding that certain carriers had excessive earnings levels when their EA, end office and transport rate elements were considered together for the period preceding application of the CC Docket No. 84-800 rate of return requirements. For subsequent time periods, EA revenues will be included in the switched traffic sensitive category for rate of return enforcement purposes. 2 FCC Rcd 7029 (1987), *recon. denied*, 3 FCC Rcd 6572 (1988).

[12] *See NYNEX Order supra* note 11.

[13] *See Bell Atlantic Order supra* note 11.

[14] New York Telephone Company Tariff F.C.C No. 41, Section 16; New England Telephone and Telegraph Company Tariff F.C.C No. 40, Section 16; Mountain Bell, Northwestern Bell and Pacific Northwest Bell Tariff F.C.C. No. 1, Sections 6.8.1 (D), 6.8.2 (D) and 6.8.3 (D); and BellSouth Telephone Companies Tariff F.C.C. No. 1, Section 6.8.5.

[15] Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Section 6.8.6; Pacific Bell Tariff F.C.C. No. 128, Sections 6.7.16 and 6.8.7; Nevada Bell Tariff F.C.C. No. 1, Section 8; Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Section 16; and Ameritech Operating Companies Tariff F.C.C. No. 2, Section 6.8.4.

[16] Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Section 6.7.15; and Rochester Telephone Corporation Tariff F.C.C. No. 1, Sections 6.7.14 and 6.8.6.

[17] United had a separate EA rate element at one time, but has discontinued it. *Compare* United Telephone System Companies Tariff F.C.C. No. 5, First Revised Page 400 *with* Second Revised Page 400; *Compare* Third Revised Page 430 *with* Fourth Revised Page 430.

[18] Petitions for Recovery of Equal Access and Network Reconfiguration Costs, FCC 85-628, released December 9, 1985, 50 F.R. 50910 (December 13, 1985) (*Accounting Order*), *recon.*, 1 FCC Rcd 434 (1986) (*Accounting Reconsideration Order*); MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-6, released January 7, 1986, 51 F.R. 2708 (January 21, 1986) (*Separations Order*), *recon.*, 1 FCC Rcd 615 (1986) (*Separations Reconsideration Order*). However, this Commission found that network reconfiguration costs associated with implementing the *MFJ* do not require special accounting and separations treatment. *See Accounting Order supra* at para. 24; *Separations Order supra* at paras. 1 and 5.

[19] This Commission initially required that the LECs amortize EA expenses over an eight year period beginning when the expense was incurred. *Accounting Order supra* note 18 at para. 33. On reconsideration, we adopted a single eight year amortization period ending December 31, 1993. *Accounting Reconsideration Order supra* note 18 at paras. 1 and 25. The Bureau has granted a number of waivers of the EA expense amortization requirement. *See, e.g.*, National Exchange Carrier Association, Inc. Petition for Waiver of Sections 36.191 (a) and 36.421 (a) of the Commission's Rules, 3 FCC Rcd 6042 (1988) (*NECA Waiver Order*).

[20] *Accounting Order supra* note 18 at para. 33.

[21] *Id.* at paras. 26-32; *Accounting Reconsideration Order supra* note 18 at para. 26.

[22] *Separations Order* and *Separations Reconsideration Order supra* note 18.

[23] The Joint Board recommended that EA costs be defined for separations purposes as including:

> only initial incremental presubscription costs, and initial incremental expenditures for hardware and software related directly to the provision of equal access which would not be required to upgrade the switching capabilities of the office involved absent the provision of equal access . . . .

MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, Mimeo No. 0138 at para. 1, released October 8, 1985, 50 F.R. 47765 (November 20, 1985) (*Joint Board EA Recommendation*). The Joint Board also recommended that the EA cost category be

limited to the cost of implementing equal access in offices which serve competitive IXCs and the cost of implementing equal access in other offices in response to a bona fide request for equal access. Under the Joint Board's recommendation, any costs related to implementation of equal access not qualifying for inclusion in the separate EA cost category were to be allocated between the federal and state jurisdictions according to the otherwise applicable separations procedures. *Id.* This Commission subsequently adopted the Joint Board's recommendations in the *Separations Order supra* note 18. *See also NECA Waiver Order supra* note 19.

[24] Equal access usage includes interstate inter-LATA EA traffic and intrastate inter-LATA EA traffic as well as AT&T and competitive carrier intra-LATA EA usage when competition is permitted on an intra-LATA basis. BOC intra-LATA toll and local exchange calling are excluded, although BOC interstate corridor toll traffic is included. *Separations Order supra* note 18.

[25] MTS and WATS Market Structure, Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs, 2 FCC Rcd 254 (1987). That Notice did not propose any changes in the procedures for the recovery of network reconfiguration costs. *Id.*

[26] In the Notice, this Commission stated that EA costs should be recovered in a manner that does not result in unnecessary rate level fluctuations. 2 FCC Rcd 254 at 255 (1987). Largely due to the amortization period that we established for EA expense items, spreading recovery of these amounts over as many as eight years, *see supra* notes 18 & 19, none of the proposals in the record appear to involve significant problems with rate fluctuations.

[27] Comments were filed by AT&T, Ameritech, the Arizona Corporation Commission (Arizona), Bell Atlantic, BellSouth, Cincinnati Bell, Contel, GTE, MCI Telecommunications Corporation (MCI), the National Exchange Carrier Assocation (NECA), the New York Department of Public Service (New York), NYNEX, Pacific, Rochester, Southern New England Telephone Company (SNET), Southwestern Bell, Teltec Saving Communications Company (Teltec), the United States Telephone Association (USTA), and US West.

[28] Replies were filed by AT&T, Bell Atlantic, BellSouth, MCI, NYNEX, Southwestern Bell, USTA, and US West.

[29] Ameritech Comments at 1, 2, 4, and 6; BellSouth Comments at 2; BellSouth Reply at 2, 7 and 8.

[30] NYNEX Comments at 1, 4, and 5; NYNEX Reply at 2, 3, and 4; US West Comments at 10; US West Reply at 5 and 6.

[31] Bell Atlantic Comments at 2; Bell Atlantic Reply at 2 and 3.

[32] Southwestern Bell Comments at 2 and 5; Southwestern Bell Reply at 4.

[33] Pacific Comments at 2.

[34] *See, e.g.*, Ameritech Comments at 2; US West Comments at 4; NYNEX Comments at 5; Bell Atlantic Comments at 3; Southwestern Bell Comments at 3; Pacific Comments at 2; BellSouth Comments at 3.

[35] *See, e.g.*, US West Comments at 2 and 5; NYNEX Comments at 4; BellSouth Comments at 4.

[36] *See, e.g.*, US West Comments at 2 and 4; NYNEX Comments at 7.

[37] *See, e.g.*, NYNEX Reply at 7; Bell Atlantic Comments at 2; Southwestern Bell Comments at 3 and 4; Southwestern Bell Reply Comments at 3; BellSouth Reply at 6.

[38] *See, e.g.*, Ameritech Comments at Appendix A and B, US West Comments at Attachments I, II and III; NYNEX Comments at Appendix A.

[39] Rochester Comments at 1 and 2.

[40] SNET Comments at 4.

[41] Contel Comments at 2 and 3.

[42] GTE Comments at 1, 5 and 6.

[43] Cincinnati Bell Comments at 2 and 4.

[44] USTA Comments at 2 through 5; USTA Reply at 2.

[45] NECA Comments at 2.

[46] AT&T Comments at 2 and 5; AT&T Reply at 1.

[47] MCI Comments at 1; MCI Reply at 10.

[48] Teltec Comments at 1, 2, and 6.

[49] Arizona Comments at 1; New York Comments at 1.

[50] Arizona Comments at 2; New York Comments at 1.

[51] Although certain parties advocate recovery of EA costs through the existing access rate elements, we do not believe that this approach should be required. The BOCs have been recovering EA costs through a separate rate element for some time and this does not appear to have created any problems. Although this is not the reason that the Commission granted the waivers permitting use of a separate EA rate element, we recognize that use of a separate rate element by the BOCs also facilitates the tracking of EA costs for purposes of the "Guarantee Clause" in the MFJ. Pursuant to the "Guarantee Clause" adopted by the Court in approving the plan of reorganization implementing the MFJ, AT&T is presently required to reimburse the BOCs for certain EA costs that have not been recovered through tariff charges by the end of 1993. *United States* v. *Western Electric*, 569 F. Supp. 1057, 1066-68 & 1124-28 (D.D.C. 1983), *aff'd per curium sub nom. California* v. *United States*, 464 U.S. 1013 (1983).

[52] As previously stated, carriers that do not have a separate EA rate element recover these costs through the Local Switching charge. This charge applies in both converted and unconverted offices, although it is subject to the 55 percent discount for non-premium access in unconverted offices. A smaller discount on the Local Switching element is also available in converted offices for Feature Group A or B service, although this is being phased out over a number of years. Amendment of Part 69, CC Docket No. 87-113, 2 FCC Rcd 6447, paras. 61-91 (1987), *recon.*, FCC 88-400, paras. 5-20, released December 12, 1988. In contrast to this, a separate EA rate element could be structured to apply only to equal access traffic, thus targeting recovery of these costs somewhat more precisely.

[53] While the BOCs would, of course, be free to discontinue use of a separate EA rate element under this approach, it appears that they will continue use of a separate element at least until January 1, 1994, since they state that this approach facilitates tracking of EA costs and revenues for purposes of the "Guarantee Clause" in the MFJ. *See supra* note 51.

[54] In order for the majority of end users to benefit from the effects of the increased precision in revenue recovery resulting from mandatory use of a separate EA rate element, the major IXCs would have to implement separate rate schedules for toll traffic to and from exchanges that had been converted to equal access.

[55] However, we do believe that it is desirable to revise the rules to permit use of a separate rate element, thereby ensuring that they reflect our actual practice in this regard rather than continuing the existing waivers in effect indefinitely.

[56] Ameritech Comments at 3 through 6.

[57] Pacific Comments at 3.

[58] NYNEX Comments at 1 and 6 through 11; US West Comments at 8 through 10.

[59] NYNEX Comments at 6 through 11; NYNEX Reply at 5; US West Comments at 5, 6, and 8; US West Reply at 2 and 3.

[60] NYNEX Comments at 7; US West Comments at 6.

[61] BellSouth Comments at 2 through 5, and 7.

[62] Bell Atlantic Comments at 2 and 3; Bell Atlantic Reply at 2 and 3.

[63] Southwestern Bell Comments at 2 through 4; Southwestern Bell Reply at 2 through 5.

[64] GTE Comments at 1 through 4, and 6.

[65] SNET Coments at 3.

[66] Rochester Comments at 1, 2, and 7 through 10.

[67] Contel Comments at 2 and 3.

[68] USTA Comments at 3.

[69] AT&T Comments at 2 and 6 through 9; AT&T Reply at 1 and 2.

[70] MCI Comments at 2, 7, and 9; MCI Reply at 1, 2, 3 and 5.

[71] Teltec Comments at 2 through 5.

[72] Arizona Comments at 4.

[73] New York Comments at 2.

[74] While we do not believe that the benefits of more precisely targeted access cost recovery are sufficient to warrant mandatory use of a separate rate element, we conclude that if a LEC chooses to implement such a rate element, it should be designed to achieve whatever benefits are possible in this regard.

[75] For purposes of this Order, the term "presubscribed EA line" includes all presubscribed subscriber lines and subscriber trunks (for example, PBX trunks) in converted offices.

[76] None of the LECs with a separate EA rate element currently use a per minute charge.

[77] AT&T Comments at 7 and 8; AT&T Reply at 5 and 6.

[78] EA costs appear to be, in large measure, a function of the number of access lines converted rather than usage levels.

[79] MTS and WATS Market Structure and Amendment of Part 69 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2324 (1987) (Joint Board Order); CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987). (Commission Order).

[80] Although the per trunk approach involves a flat monthly charge, the number of trunks that an access customer uses is affected by the volume of traffic that it carries as well as the "fill" that it is able to achieve on its trunks without producing an unacceptable level of call blocking.

[81] We are not persuaded by those parties who contend that a separate per minute charge is preferable to a per trunk charge. Although these two approaches are similar in certain respects, the level of EA costs paid by each IXC under a per trunk charge is affected by the "fill" that it achieves on its trunks. Use of a per minute charge would eliminate this factor. While MCI argues that a per trunk charge discriminates against carriers with low usage per FGD trunk, MCI Comments at 4-5, based on the record presently before us in this proceeding, retention of the existing per trunk charge does not appear to be unreasonable for purposes of recovering equal access costs. *See* AT&T Comments at 7. Furthermore, as another OCC argues, a per trunk charge is attractive insofar as it rewards carriers that operate efficiently. Teltec Comments at 5. Nor do we believe that use of a per minute charge (either through a separate rate element or through recovery of EA costs under the Local Switching charge) would make it significantly easier to avoid over-recovery of EA costs by the LECs, as MCI suggests. When certain LECs experienced excess earnings under the present per trunk rate structure, this Commission ordered appropriate refunds. *See* note 11 *supra*. In addition, our experience with the annual access tariff filings makes clear that developing properly targeted per minute rates is not significantly less complex an effort than developing per trunk rates due to questions concerning projected traffic volumes.

[82] MCI argues that the LECs benefit substantially from the implementation of equal access, and contends that they do not pay an appropriate share of these costs under the present flat rate charges. While certain of MCI's contentions appear to address intrastate ratemaking matters not at issue in this proceeding, we are requiring that the LECs pay EA costs to the extent that they use EA capable lines or trunks for the provision of interstate service. We expect that this requirement will apply primarily to the provision of BOC interstate corridor toll service. If the rate structures that we have approved for separate EA elements cannot be used to recover EA costs from the LECs, an appropriate surrogate will have to be developed to ensure that LECs providing interstate toll services pay their proportionate share of EA costs. Any departure from the procedures described in the rules we are adopting will, of course, require Commission action.

AT&T may continue to use FGC in converted offices under certain circumstances. In such cases, the FGC trunks used by AT&T and the presubscribed lines served by AT&T will be subject to the charges applied to FGD trunks and presubscribed EA lines. Any other approach could result in a disproportionate recovery of EA costs from the competitive interexchange carriers. Furthermore, AT&T's continued use of FGC in these circumstances is not generally apparent to customers who have presubscribed to AT&T in the balloting process.

[83] This would be true regardless of whether the rate element is structured as a per minute charge or a flat charge applicable to all trunks and FGA lines.

[84] FGB terminating access provides functions that are similar to those provided by FGC and FGD, and AT&T's competitors often use terminating FGB as a substitute for FGD. However, terminating FGB has been classified with FGA and originating FGB as non-premium access, *see* NECA Tariff F.C.C. No. 1, Section 6.7.1 (D), and we do not believe that this long-standing classification should be changed in this proceeding by applying EA charges to terminating FGB in converted offices.

Our decision to bar application of the separate EA charge to FGA is based on the record in this proceeding which does not indicate that EA functionalities are generally available with this service as presently tariffed. However, in recent tariff filings, the New York Telephone Company and New England Telephone and Telegraph Company state that certain EA functionalities are available with FGA. The Common Carrier Bureau has suspended these filings and instituted an investigation concerning them. New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 930 and New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 913, DA 88-1757, released November 4, 1988 (*Designation Order*); New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 930 and New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 913, CC Docket No. 88-537, 3 FCC Rcd 7013 (1988) (*Erratum*). We are adopting the rule changes discussed herein on the basis of the current record in this proceeding. The LECs are free to request a waiver of these rules if they believe that they provide sufficient EA functionalities with FGA to warrant application of the charge, in whole, or in part. Any such request must, of course, be accompanied by a showing concerning the EA functionalities available with this service which would justify waiving our

rules. In the absence of such a waiver request and showing, no separate EA charge consistent with our rules may be imposed on FGA lines.

[85] As previously discussed, we do not believe that the benefits of more precisely targeted access cost recovery warrant mandatory use of a separate rate element. *See supra* paras. 14-15.

[86] Few of the parties discuss this issue.

[87] We certify that the Regulatory Flexibility Act, 5 U.S.C. § 601, *et. seq.* (1982), is not applicable to the rule changes we are adopting in this proceeding. In accordance with the provisions of Sections 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Order in the Federal Register. As part of our analysis in this Order, however, this Commission has considered the impact of its decision on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines. Because of the nature of local exchange and access service, this Commission concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies. This decision recognizes the needs of small telephone companies in making use of a separate EA rate element optional.

[88] This action is taken pursuant to Sections 4, 201-203, 205, 218 and 403 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154, 201-203, 205, 218 and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions from
digital devices.

NOTICE OF PROPOSED RULE MAKING

Adopted: February 13, 1989; Released: March 7, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to incorporate into its Rules by reference a procedure for measuring electromagnetic emissions from digital devices. [1] This procedure, to be entitled "FCC Procedure for Measuring Electromagnetic Emissions from Digital Devices, FCC/OET TP-5" (TP-5) is a revision of the Commissions existing measurement procedure for digital devices, FCC/OET MP-4. The purpose of this revised procedure is to: (1) improve the present measurement technique based on the experience of the FCC Laboratory Staff and industry in testing computers over the past six years; (2) include recent suggestions made by industry to reduce the testing burden and to improve the repeatability of testing; and (3) include the recent changes proposed in a related rulemaking proceeding to Part 15 of the Commission's Rules.[2] The proposed procedure, TP-5, is contained in Appendix B, attached.[3] A detailed discussion of TP-5 and its development is provided below.

BACKGROUND

2. Computers and similar digital electronic devices, unless properly designed and manufactured, produce electromagnetic emissions (EME), which emanate from the cabinet and interconnecting cables. These emissions can cause harmful interference to nearby radio and TV reception. To address this interference concern, the Commission, in 1979, codified Subpart J of Part 15 of its Rules to limit the interference potential of digital devices.[4] To assist manufacturers in testing such equipment to determine compliance with the new rules, the Commission in 1983 adopted MP-4(1983), entitled "FCC Methods of Measurement of Radio Noise Emissions From Computing Devices." [5]

3. MP-4 sets forth uniform methods for measuring both radiated and line conducted EME from large and small computers to determine compliance with the technical limits in Part 15. Specifically, it describes the environment, instrumentation and conditions for testing digital equipment. MP-4 was the outgrowth of the work of the Standards Committee on Electromagnetic Compatibility, C-63, and the Computer Business and Equipment Manufacturers Association (CBEMA). [6,7]

4. Several recent developments lead us to believe that it is now time to consider revising our test procedure for digital devices. First and foremost, the computer industry has changed dramatically since 1980 in ways that affect how computers are tested. For example, the number of manufacturers has increased, as has the number of facilities available for testing. Moreover, many manufacturers are now developing individual products for integration with the products of other manufacturers. As a result, the ability of a single manufacturer to control how its product will be used has essentially disappeared. Changes in technology, proposed changes to Part 15 and the desire to incorporate our experiences of the last several years are additional reasons for revising MP-4.

5. In July, 1987, MP-4 was revised to provide a more comprehensive explanation of how the Laboratory is testing personal computers and associated peripherals. This revision improved on MP-4(1983) in three areas. First, it defined a minimum personal computer system for testing purposes. Second, MP-4 (1987) provided information with regard to how to configure, operate and manipulate a system to insure repeatable results. Third, it incorporates a modified line conducted emission test set-up.

6. At about the same time, CBEMA submitted a proposal for a new procedure to replace MP-4(1983). CBEMA argued that its proposal is a more practical and repeatable measurement procedure than MP-4 (1983). CBEMA further stated that its proposed revision is needed to help resolve industry disputes, and to adjust the measurement procedure in accordance with the industry changes described above. The major points of this proposal are:

(1) Specification of a preferred testing method, with acceptance of alternative testing.

(2) Establishment of fixed antenna distances (3 meters Class B, 10 meters Class A).

(3) Establishment of a standard test site.

(4) Requirement of site attenuation measurements for both horizontal and vertical polarization.

(5) Preference for broadband antennas instead of dipoles.

(6) Limited maximization of EUT emissions.

(7) Relaxation of limits for "clicks" (short duration emissions).

(8) Establishment of minimum reporting requirements.

7. In response to the CBEMA proposal and our desire to update and improve MP-4, the Commission issued a Public Notice on August 4, 1987 inviting comments on the CBEMA proposal and MP-4. A total of 24 parties filed comments, and 14 filed reply comments in response to the Public Notice. Lists of parties filing comments and reply comments, along with the acronym for each party used herein, is contained in Appendix A.

DISCUSSION

8. The comments filed in response to the Public Notice raise a number of important issues concerning the suitability and effectiveness of our measurement procedure for digital devices and the burden it imposes on equipment suppliers. We also observe that over the past five years of testing computers, the Commission and industry have gained experience that can now be used to improve our measurement procedure for such devices.

9. Accordingly, we find it desirable to initiate a comprehensive review and revision of our measurement procedure for digital devices. We have developed the proposed procedure based on the comments received in response to the Public Notice, the proposal submitted by CBEMA, and our own experience in testing and evaluating computers and other digital devices at the FCC Laboratory. We invite comments on all aspects of the proposed new FCC/OET TP-5 in Appendix B, and on any other issues that may bear on the effectiveness of this procedure for safeguarding the radio frequency environment with the minimum burden on digital equipment suppliers. We are also proposing that this procedure be incorporated into the Rules by reference. This will clarify that the measurement procedure is a formal part of our rules and regulations. The discussion which follows addresses the issues raised in the comments and sets forth the proposed changes to the existing MP-4 that would be incorporated into the new TP-5 procedure.

General Issues

10. *Class A and Class B Digital Devices.* Motorola observes that the Commission's Rules make a clear distinction between Class A and Class B digital devices, but that measurement procedure MP-4 does not. Motorola further notes that the August 18, 1987, Public Notice announcing the release of MP-4 (1987) indicated that the revised measurement procedure was primarily intended to give more guidance for testing Class B digital devices. Amador strongly recommends that two test procedures be issued, one for Class A, and one for Class B devices. However, CBEMA recommends incorporating all measurement methods and procedures in a single source document.

11. We believe it desirable to incorporate all of the digital equipment measurement procedures into a single document. This would simplify reference activities and reduce the printing costs associated with these standards. However, we recognize the concerns expressed by Motorola and Amador that there should be clear distinctions between the procedures for Class A and Class B devices. We are proposing, as a compromise, to divide TP-5 into three separate sections dealing with: (1) General information; (2) Procedures for measuring table-top devices or systems; and (3) Procedures for measuring floor-standing and other large digital devices.

12. *Conformity with International Standards.* Several parties argue that the Commission should conform with international standards for digital equipment. They specifically recommend adopting the limits and test methodology of the International Special Committee on Radio Interference (CISPR).[8] Many of the recommendations adopted by CISPR, such as CISPR Publication 22, have been adopted by a number of foreign countries, most notably European countries, for controlling interference.[9] Japan also has adopted voluntary standards based on CISPR and other countries of the IEC are in the process of aligning with the CISPR standards.

13. HP argues that MP-4 should conform with CISPR Publication 22. It submits that this would reduce approval costs, allow increased product performance and lower prices since European and Japanese standards are based on Publication 22. Motorola, NCR and Amador, in reply comments, and Ridge and Wyse agree with HP that the Commission should conform with CISPR, at least in part. CBEMA and IBM comment that, to the extent the U.S. computer industry can maintain a commonality of testing for products intended for export, both the industry and the domestic economy are benefited. Apple suggests the addition of CISPR Publications 16 and 22 to the list of references contained in MP-4.

14. The test methodology in Publication 22 and the proposed TP-5 are very similar and are, in fact, in alignment with one another in the following aspects: 1) line conducted EME measurements are performed with a 50 uH/50 ohm LISN and the same size ground plane; 2) radiated EME measurements are performed using a table 0.8 meters above the ground plane and maximizing these emissions by rotating the equipment under test and varying the measurement antenna height between 1 and 4 meters above ground; and 3) radiated EME measurements at distances other than the limit distance are permitted. We request comments regarding whether the Commission should further conform its emission limits and test procedures with the CISPR procedure.

15. *Broadband and Narrowband Limits.* A number of commenting parties address the treatment of broadband and narrowband EME. Broadband emissions are spectral components of EME that cannot be resolved within the specified bandwidth of the measuring receiver. MP-4 allows a 13 dB relaxation of the limits for line conducted emissions which are determined to be broadband when using a specified procedure. This relaxation recognizes the fact that the interfering effect from broadband emissions is less severe than the effect of narrowband emissions.

16. CBEMA requests a change in the measurement procedure to state that the emission must comply, when measured in both the average and quasi-peak modes, and that a 13 dB reduction be allowed for the quasi-peak measurement. This suggestion represents a significant departure from MP-4, since the limit for many line conducted emissions which are not broadband would be relaxed by 13 dB. JEIDA, on the other hand, suggests a tightening of the relaxation from 13 to 10 dB for Class B devices only. E^3 comments that the relaxation for broadband emissions should apply to radiated as well as line conducted emissions. Mr. Janwich comments that we should determine whether an emission is broadband by switching the IF bandwidth of the receiver rather than using the detector function to determine the nature of the signal. We find that the issue of a relaxation of the limits for broadband emissions is a matter to be addressed in the context of changes in the rules for Digital Devices, rather than in the measurement procedure. Since the relaxation of the limit for broadband emissions would be retained in our proposed revision of the Part 15 Rules in General Docket No. 87-389, it is included in the proposed TP-5.[10]

17. *Rule Interpretations.* IBM suggests that the Commission designate an official to answer technical questions on EMI measurements, and the responses to the questions should be collated and periodically disseminated for review. It submits that this would help eliminate duplicate requests and improve consistency and uniformity of the Commission's responses to inquiries. AT&T agrees with

IBM, stating that the release of MP-4 (1987) "unsettled" many past understandings of test procedures. AT&T recommends using the FCC Laboratory's PAL computer system to access rulings. [11] In response to these requests, we propose to re-establish a Digital Device Panel in 1989 to address non-routine requests for interpretations.[12] We also propose that a summary of its interpretations would be placed on the PAL system.

18. *Implementation of New Measurement Procedures.* AT&T and EIA/CEG argue that if any changes are made to MP-4, devices tested and found compliant under MP-4 prior to adoption of such changes should be considered acceptable. EIA/CEG believes that existing sites recognized under Section 15.38 should continue to be recognized as acceptable for a reasonable amount of time in the event the Commission decides to require vertically polarized site attenuation measurements in addition to horizontally polarized measurements. AT&T believes that the Commission should continue to accept test results made at a 30 meter distance for existing equipment if it changes the limit distance in the Rules to 10 meters. We recognize that transitional provisions may be necessary with the implementation of the proposed new procedure. We propose to implement the new procedure over a period of at least one year. Comments are requested on this approach.

Specific Proposals

19. Appendix B sets forth the proposed revised FCC procedure for measuring EME from digital devices. Comments with respect to specific subjects of the revised procedure are discussed below.

20. *Test Site.* The proposed procedure would require a test site that assures a valid and repeatable representation of the characteristics to be measured under a given set of conditions. An alternative test site, such as an absorber lined chamber for radiated EME measurements, may be used on a case-by-case basis, if it can be shown to be equivalent to an open area test site.[13] However, the Commission will use an open area test site for radiated EME measurements.

21. *Testing at the User's Installation.* In recognition of the fact that many large Class A Digital Devices cannot be tested on a standard open area test site, MP-4 permits on-site testing. If three large, essentially identical, Class A computers are tested on site and found to comply, subsequent production units of the same computer are assumed to be compliant. AT&T comments that more guidance needs to be given in MP-4 about on-site testing, because of the large number of complexities involved. The CBEMA procedure includes a statement that a ground plane should not be used for testing, unless it is part of the installation. ACIL and E^3 argue that on-site testing is impractical, and according to ACIL, test sites are now available to measure all sizes of equipment. To provide flexibility in testing, we are proposing to continue to allow on-site testing of devices which can not be measured at an open area test site, or at an alternative site which is equivalent to an open area test site. We also propose to specify that a ground plane should not be installed for testing at a user's installation unless it is a permanent part of the installation. We have also attempted to provide more guidance with respect to on-site testing.

22. *Test Platform.* MP-4 states that a table height of 0.8 meters will be used for AC line conducted measurements, and a table height of 1.0 meters will be used for radiated measurements. CBEMA's proposal specifies that a table height of 0.8 meters shall be used for both radiated and line conducted measurements.

23. Most of the comments agree that the height should be set to 0.8 meters for the radiated test. This would conform with international standards (CISPR 22) and the Commission's line conducted setup. In addition, some parties indicate that a height of 0.8 meters is more representative of actual use than a one meter height. Stauffer states that it has not observed any significant difference in test results made with tables having a height of 1.0 meter or 0.8 meters. Mr. Janwich, an independent consultant, recommends standardizing the table heights for radiated and line conducted measurements at 1.0 meter rather than 0.8 meters. We agree that conforming the table height with national and international standards is desirable and propose a table height of 0.8 meters for both radiated and conducted measurements. This change would eliminate the need for re-positioning the EUT when going from the radiated to conducted portion of a test and would not appear to have any effect on measured results.

24. *Ground Plane.* The use of a ground plane for making radiated measurements is part of the issue of what constitutes a standard test site. Because we are deferring consideration of the definition of a standard test site to a future rule making, we are not proposing any changes to the measurement procedure at this time. We propose that the measurement procedure continue to state that a ground screen is highly recommended, but not mandatory for radiated testing, unless the test site is elevated above ground level.

25. *Measuring Receiver* In its proposal, CBEMA proposes that radiated and line conducted measurements be made with receivers conforming to CISPR Publication 16. Alternatively, spectrum analyzers or receivers using peak detectors could be employed, but measurements made with the CISPR instrumentation would take precedence. NCR, in reply comments, agrees with CBEMA that the CISPR instrumentation should be used. AT&T recommends specifying instrumentation with the ANSI, rather than CISPR quasi-peak detector function, since the ANSI reference C63.2 contains the CISPR instrumentation recommendations.

26. CISPR instrumentation was originally specified in 1979 for measuring EME from digital devices for the following reasons: (1) the instrument is well defined and is internationally recognized for making repeatable EME measurements up to 1000 MHz; and, (2) the CISPR instrument provides a good indication of the actual interference potential of an EME. For these reasons, we propose to continue specifying the CISPR instrument as the preferred test receiver for measurements up to 1000 MHz. As requested by CBEMA, other instrumentation, such as a spectrum analyzer, may be used, but results taken with the CISPR instrumentation would take precedence. Since the ANSI standard C63.2 contains the specifications for the CISPR instrument, TP-5 will reference the CISPR instrumentation in C63.2. Further, we propose that measurements above 1000 MHz would be made in the peak mode in accordance with the proposal in this regard in General Docket No. 87-389.[14]

27. *Measuring Antennas.* In its proposed procedure, CBEMA specifies that calibrated, balanced, linearly-polarized, broadband antennas are preferred for measuring radiated emissions. In the CBEMA procedure, balanced,

tuned dipoles would also be acceptable for measurements above 80 MHz, and for measurements below 80 MHz when tuned to their 80 MHz resonant length.

28. The commenting parties are divided on this issue. CBEMA, CCL, AT&T and ICC favor the use of broadband antennas because they allow measurements to be made more quickly than tuned dipoles. AT&T and E[3] state that vertically polarized measurements can be made acceptably at a 1 meter height with a broadband antenna (such as a biconical). C63 and CCL believe that broadband antennas are just as accurate as dipoles. EMCO contends that broadband antennas are more accurate at the lower frequencies from 30-70 MHz because there is less coupling to the ground plane than there is with dipoles. SCI favors the use of biconical antennas from 30-200 MHz, and log-periodic antennas from 200-1000 MHz.

29. On the other hand, some parties prefer the use of dipoles as the standard. EIA, DS&G, Motorola, and JBMMA recommend the use of dipoles because their characteristics, such as gain, pattern, etc., are better known than those of broadband antennas. They argue that for those reasons, dipoles provide more consistent and more accurate results. JEIDA prefers dipoles, but states that broadband antennas also are acceptable. NCR believes that broadband antennas should be permitted for uses other than compliance testing (presumably for prescans). MET believes that broadband antennas should be permitted for automated scans if correlatable to a dipole, but that dipoles should be used for measuring emissions within 8 dB of the limits. EIA and Mr. Janwich state that broadband antennas have high voltage standing wave ratios (VSWR) at low frequencies. NCR, Ridge, Apple, and JEIDA recommend the use of tuned dipoles down to 80 MHz and below 80 MHz, dipoles tuned to 80 MHz.

30. We believe it is desirable to continue to use dipoles as the standard for compliance testing on frequencies below 1000 MHz, since their characteristics are well known. We propose that test laboratories may use broadband antennas if correlatable to a dipole; however, such laboratories should be aware that the Commission will use dipoles as the standard for determining compliance. We do not agree with the proposal by some commenting parties to de-tune the antenna for frequencies below 80 MHz, since the antenna factor and gain will be meaningless under these conditions. We also propose to specify the use of a linearly polarized horn as the measuring antenna for EME above 1000 MHz.

31. *Antenna-to-Test Unit Distance.* A number of the commenting parties raised questions about the distance at which measurements are made to determine compliance. The present rules for computing devices specify the radiated limit at 3 meters for Class B computing devices and 30 meters for Class A computing devices, while MP-4 permits measurements at any distance between 3 and 30 meters. CBEMA and other parties argue that the conversion factor (1/d) currently used in MP-4 for extrapolating measurements made at distances other than the limit distance in our Rules to equivalent values at the limit distance is not valid and should not be used. Several parties also argue for a change in the limit distance to 10 meters so that an extrapolation factor will not have to be used. We are aware of the concerns expressed by commenting parties regarding the use of the 1/d extrapolation factor. However, we also observe that cases will arise where it is not possible to measure radiated emissions at the limit distance specified in the Rules regardless of the distance we choose.[15] We believe the only acceptable alternative to the 1/d extrapolation factor is to require testing parties to develope individual conversion factors to fit the specific test situations. Such conversion factors would need to take into account the emission frequency, the particular EUT, and site characteristics for measurements made at two different distances and, therefore, would be burdensome. To avoid the burden that would be imposed by determining individual extrapolation factors, we are proposing to continue the use of the less accurate 1/d factor. Of course, tests made at the limit distance would take precedence in case of disputes. We request comment on this proposal and invite interested parties to propose alternative methods that would provide more economical, accurate and reliable conversions.

32. *Antenna Height Variation.* In MP-4, the height of the receive antenna was varied from 1 to 4 meters above ground for test distances up to 10 meters. For distances greater than 10 meters, the height was varied from 2 to 6 meters.[16] The revised MP-4 changed this by reducing the minimum scan height to 1 meter for test distances between 10 and 30 meters. CBEMA's proposal retains the MP-4 (1983) height variations of 2 different height scans based on the test distance.

33. In its comments, CBEMA objects to the MP-4 (1987) requirement for antenna height scans down to 1 meter for distances greater than 10 meters, stating that no technical justification for this change is given other than to further maximize emissions. In addition, CBEMA objects to the deletion of language from MP-4 (1983) which allowed alternate height scans for sites other than open field (such as an anechoic chamber). However, ACIL disagrees with CBEMA that a height range other than that specified by the Commission should be used. Ridge recommends adopting CISPR 22, Section 10.2, which specifies a height range of 1-4 meters for all distances from 3-30 meters. WYSE and AT&T also recommend using a 1-4 meter height for all distances. In addition, AT&T states that the minimum height for the center of a vertically polarized broadband antenna at low frequencies should be the same as that for a tuned dipole with its tip 25 cm above the ground plane. E[3] points out that measurements cannot be made at a one meter height for a vertically polarized tuned dipole at 30 MHz, and recommends the use of a biconical antenna instead. MET states that the minimum height from the tip of a vertical dipole to the ground plane should be 25 cm, as specified in MP-4 (1987).

34. Changing the scan height of the receive antenna has the potential for changing the measured results, particularly when extrapolating the test data from one test distance to another distance. This is why it is desirable to perform tests at the limit distance. Moreover, in view of the proposed change in the limit distance for Class A devices to 30 meters, we propose a 1 to 4 meter scan height for antennas at test distances of 3 to 30 meters. We also propose that the minimum height for a vertically polarized antenna be increased as necessary so that the tip of the antenna is at least 25 cm above the ground plane.

35. *Calibration.* In its proposed procedure, CBEMA describes a method for calibrating broadband antennas. Alternatively, it proposes that National Bureau of Standards (NBS) Technical Note 370, March, 1969, which is incorporated by reference, could also be used.[17] Either method is deemed acceptable according to CBEMA.

36. SMC claims CBEMA's method of calibrating antennas can be difficult to use, and provides its own method of calibrating broadband antennas referenced to dipoles. DS&G states that CBEMA's method would require calibration of antennas by the National Institute of Standards and Technology (NIST), or by the "three antenna" method, which is burdensome.[18] DS&G also does not believe that all antennas calibrated using CBEMA's method would yield the same results, since the antennas would be calibrated using a linearly polarized source, but would be used to measure devices with multiple polarizations. HP disagrees with CBEMA's calibration method, stating that the calibration should take into account both frequency and antenna height. GTE claims that calibrating antennas using CBEMA's method does not completely describe the antenna, because no reference is specified, nor does it take into account VSWR, directionality, and gain over isotropic.

37. We propose to allow any one of several published techniques to be used for calibrating dipole antennas.[19] Alternatively, the antenna may be calibrated by NIST. The FCC Laboratory is conducting an internal investigation of the various procedures to calibrate antennas. The results of the study will be published at a later time. In the interim, we are proposing that the measuring instruments, antennas, test facility, and LISN will be calibrated, as necessary, to insure accuracy of measurements. No specific procedures are specified for the antennas or measuring instruments. We further propose that the test site be calibrated in accordance with FCC Bulletin OET 55 (see the standard test site issue). A recommended procedure for calibration of the LISN has been included in TP-5.

38. *Data Reporting Format.* A number of parties comment on the guidelines for reporting measurements for each device tested. Most of the comments addressed two points: 1) the number of data points to be reported; and, 2) the units of measurement in which to report the measured values. Most of the parties oppose reporting all emissions within 10 dB of the limits, as stipulated in paragraph 1 of clause 7.0, MP-4 (1987). Commenting parties also object to reporting test results in microvolts (uV) and microvolts per meter (uV/m) instead of dB referenced to uV and uV/m. They also ask the Commission to accept data expressed in graphical form. We agree that requiring all emissions within 10 dB of the limit to be reported is an unnecessary burden on parties performing certification or verification testing. In addition, we see no reason why the test data must be converted to uV and uV/m. We propose to accept data in either dBuV & dBuV/m or uV & uV/m, so long as the units are consistent. We further propose to require reporting of the six highest line conducted emissions on each conductor in the EUT. For radiated emissions, we propose to require reporting of the highest vertically and horizontally polarized emission in each limit frequency band (i.e. 30-88 MHz, 88-216 MHz, etc.). Comments are solicited on this proposal, the present format and any alternative methods for data reporting.

39. *Testing of a Personal Computer System.* A number of parties filed comments about the testing and manipulation of a personal computer to insure repeatable results. The comments addressed the manipulation of system components, what constitutes a minimum system, interconnecting cables, and related issues concerning testing of a personal computer and associated peripherals. Considering the comments, we are proposing the following changes to the test procedure. First, we are retaining the requirement that a minimum typical system must be tested to show compliance. For a personal computer and associated peripherals, this would consist of a computer, keyboard, monitor and one or more peripheral devices, such as a printer or modem. We are also proposing that the system be tested in a single fixed configuration and that only the interconnecting cables be moved to maximize the level of EME. Excessive manipulation of cables, such as looping or coiling of cables, will not be required. Alternatively, we request comments as to whether it is appropriate to test only the EUT without peripheral equipment attached. Comments on other approaches are also solicited.

40. *EUT Operating Conditions.* MP-4 (1987) states that the EUT will be examined while idling and while receiving/sending data in a typical operation. Each emission will be maximized by varying the mode of operation, clock speed and software programming. In addition, a personal computer or peripheral will be operated with a Basic language program that sends a constantly repeating line of "H"s to all peripherals, the monitor, and disk drives.

41. IBM, EMCO, DS&G, Ridge, CBEMA, and AT&T all oppose the use of scrolling "H"s. Their comments generally state that the scrolling "H"s are not typical of actual usage of a computer, causing it to produce higher levels of emissions. Ridge, AT&T and CBEMA recommend random ASCII characters or a succession of keyboard characters. Retlif supports the use of the "H" test pattern for personal computers because it is clearly understood and seems to be the worst case test. Apple suggests the use of a different pattern if it would result in higher emissions than the "H" pattern. MET believes that all modes of operation should be investigated to determine the worst case emissions. However, Tandy and IBM recommend that the device only be examined in the running mode to speed up testing, since the worst case emissions are "invariably" found in that mode.

42. We agree with the commenting parties who believe it is desirable to specify a set of standard operating conditions in order to facilitate repeatability of test results. For this purpose we propose: 1) contrast control set to maximum; 2) brightness control set to raster extinction; and, 3) for color monitors, use of white to represent all colors. In addition, the scrolling "H" pattern would continue to be specified for both text and graphics monitors for table top devices because it is an easy pattern to duplicate and can be used for most types of monitors on the market. Comments are requested on this approach.

43. *AC Power-line Conducted Test Set-up.* A number of parties object to the line conducted set-up specified in MP-4 (1987). In view of the concern expressed about measured line conducted emissions, an internal study was conducted at the FCC Laboratory on the effect of using two LISN's and changing the distance between the EUT and the back wall of the test chamber. The results of this study showed that there were no significant differences caused by changing the distance between the conducting wall surface to the EUT from 2 meters to 40 cm. Accordingly, we are proposing to change the minimum dimensions of the room used for the line conducted test. Additionally, we are proposing the use of two LISNs, one for the EUT, and a second one for the peripherals. We did not find a significant difference in results when using two LISNs, and it is believed that the use of a second

LISN will provide more repeatable results from site to site by providing a standard impedance to the peripherals. These proposed changes should address the concerns expressed in the comments and will more closely conform the measurement procedure with international standards.

44. *Testing of a Floor-standing Computer.* As mentioned above, a separate section has been added to TP-5 to address the special issues of testing Class A digital devices, which for the most part consist of floor-standing computers or a combination of floor-standing and table-top equipment. The following is a summary of the changes we are proposing in Section III of TP-5: (1) the conducting wall for floor-standing equipment would be deleted for line conduction tests on large systems, provided a conducting floor is utilized; (2) a ground plane would be recommended for radiated measurements of large equipment but not required; (3) the minimum horizontal distance from the LISN to the EUT would be changed from 0.8 meters to 1.0 meters; (4) the power cables and the interconnecting cables between the EUT and system components would be required to be elevated above the metal ground plane by at least 25 centimeters; (5) a preferred method would be indicated for the routing of inter-connecting cables to remotely located peripherals. These changes are to stabilize conditions which affect the repeatability of test results on large computers. Comments on these and other proposed changes for the testing of Class A systems are solicited.

PROCEDURAL MATTERS

45. Under the procedures set out in Section 1.415 of the Commission's Rules, interested persons may file comments on or before **May 8, 1989** and reply comments on or before **June 7, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided such information or writing indicating the nature and source of such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

46. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and five (5) copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their comments are given the same consideration regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters in Washington, D.C.

47. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time that a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See, generally,* Section 1.1231 of the Commission's Rules.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

48. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and purpose of this action:

49. In the course of performing testing on digital devices at the Commission's Laboratory, a significant percentage have been found to be non-compliant with the RF emission limits in the Rules. Revisions to the procedure are believed necessary in order to provide more specific information on how the Commission is testing such devices. In addition, the Commission has received a proposal from industry to replace the current measurement procedure for digital devices with one which the correspondent believes to be more practical and repeatable. Released herewith is a proposed revised procedure based on comments previously received to our request for comments on the industry proposal, and to our July, 1987 revision of the test procedure. Finally, we believe it is necessary to incorporate the test procedure into the Rules by reference to provide adequate notice to the public on how digital devices are actually tested by the Commission.

II. The objectives:

50. Our objectives in proposing these changes are to clarify, and where possible, simplify the test procedures for digital devices. By providing additional guidance on how the Commission tests digital devices, it is hoped that the compliance rate for these devices will be increased. Also, we wish to provide an opportunity for industry to comment on the proposed changes.

III. Legal basis:

51. The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302 and 303 of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected:

52. The proposed changes will potentially affect all manufacturers of digital devices, and laboratories performing certification and verification tests on such devices, but the exact number of small entities affected is not known. It is believed that clarification and simplification of the test procedure will benefit manufacturers and test laboratories by speeding testing and reducing compliance costs.

Additionally, increasing the compliance rate for devices tested at the Commission's Laboratory will allow manufacturers to obtain approval for new products more quickly, and therefore to market them more quickly.

V. Recording, record keeping and other compliance requirements:

53. The proposed procedure will decrease recording requirements by reducing the amount of test data required to be reported from all emissions within 10 dB of the limit to only the six highest emissions. Otherwise, no changes in recording or record keeping requirements are proposed.

VI. Federal rules which overlap, duplicate or conflict with this rule:

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objectives:

None.

54. For further information on this proceeding, contact Hugh L. Van Tuyl or Richard F. Fabina, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, (301) 725-1585.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The terms "Computing Device", "Digital Device" and "computer" for the purposes of this proceeding are used interchangeably to refer to any device that generates digital pulses in excess of 10,000 Hz uses didital techniques. Computing Device is defined in Section 15.4(n) of the current Rules, 47 C.F.R., Section 15.4(n).

[2] *Notice of Porposed Rule Making* (Operation of radio frequency devices without an individual license) in GEN Docket No. 87-389, adopted September 17, 1987, 2 FCC 2nd 6135 (1987).

[3] The Commission chose the "TP" designation so this measurement procedure would not be confused with existing measurement procedures which have the "MP" designation. The number "5" was chosen because TP-1 through TP-4 have been reserved for measurement procedures dealing with the proposal in GEN Docket No. 87-389.

[4] Subpart J of Part 15 of the Rules was adopted by the Commission in 1979. *See Report and Order* in FCC Docket No. 20780, 44 FR 59530 (1979).

[5] *See Report and Order* in General Docket No. 80-284, 46 FR 23240 (1981) and 48 FR 34748 (1983).

[6] CBEMA is a trade association of forty-five manufacturers and vendors of computers, office equipment and information services. CBEMA has been a participant in the development of the limits and methods of measurements for computing devices from 1976 to the present.

[7] The Standards Committee on Electromagnetic Compatibility is a voluntary standards making organization accredited by the American National Standards Institute with the Institute of Electrical and Electronics Engineers, Inc. as its secretariat. It consists of representatives from a wide variety of concerned industry, trade, government and professional organizations which, when previously known as the Radio Electrical Coordinating Committee of the ANSI, C-63, was responsible for developing the procedure C63.4 for measuring the interference potential of low voltage devices.

[8] CISPR is a voluntary standards making organization under the auspices of the International Electrotechnical Commission (IEC), which adopts recommendations for limits and methods of measurements for controlling radio interference from computer and various other appliances.

[9] CISPR Publication 22 (1985) contains limits and methods of measurements for Information Technology Equipment, which includes the same equipment that we define as Computing Devices.

[10] *See Notice of Proposed Rule Making* in GEN Docket No. 87-389, *supra*.

[11] The Public Access Link (PAL) is system to allow the public access to information, via a telephone line and modem, about the status of applications for equipment authorization, test sites and recent public notices affecting the Equipment Authorization Program. PAL may be accesed by dialing (301)-725-1072.

[12] In 1980, a Computing Device Panel was established to answer questions on the new rules in Part 15 for controlling RF emissions from computing devices. Letters of interpretation are on file with the Technical Standards Branch. Although the Panel ceased to exist about 1984, letters of interpretation continued to be answered by the Technical Standards Branch.

[13] Comments about test sites are deferred to a separate proceeding to revise FCC Bulletin OET-55, which describes the physical characteristics of an open area test site, as well as, a procedure to measure its site attenuation.

[14] *See Notice of Proposed Rule Making* in GEN Docket No. 87-389, *supra*, at paragraph 34.

[15] The issue of changing the limit distance for digital devices is being addressed in the proceeding to revise the Part 15 Rules in GEN Docket No. 87-389. *See Notice of Proposed Rule Making* in GEN Docket No. 87-389, *supra*, at paragraph 25. Our final decision on this issue in that proceeding will consider the concerns associated with conversion factors.

[16] The minimum height is limited for a vertically polarized antenna so that the tip is at least 25 cm above the ground plane.

[17] On August 23, 1988, the National Bureau of Standards was officially renamed the National Institute of Standards and Technology. Although NIST is now the correct acronym, the acronym NBS appears on all documents issued before August 1988.

[18] NIST is the new acronym for NBS. *See* footnote 17.

[19] National Bureau of Standards Technical Note 1309 - April 1987, "NBS Calibration Procedures for Horizontal Dipole Antennas (25-1000 MHz)" and American National Standard (ANSI) C63.5 - 1988, "Standard for Calibration of Antennas Used for Radiated Emissions Measurements" are examples of such published techniques.

Appendix A

List of Parties Filling Comments to MP-4

Party	Acronym
American Council of Independent Laboratories, Inc.	ACIL
American Telephone and Telegraph Company	AT&T
Apple Computer, Inc.	Apple
Computer and Business Equipment Manufacturers Association	CBEMA
Communication Certification Laboratory	CCL
Dash, Straus & Goodhue, Inc.	DS&G
Electronic Industries Association	EIA/CEG
EMACO, Inc.	EMACO
Electro-Mechanics Company	EMCO
EMI/EMC Tech Committee, Japan Business Makers Association	JBMMA
GTE Service Corporation	GTE
Hewlett-Packard Company	HP
International Business Machines Corporation	IBM
Japan Electronic Industry Development Association	JEIDA
MET Electrical Testing Company, Inc.	MET
Motorola, Inc.	Motorola
NCR Corporation	NCR
Retlif, Inc.	Retlif
Ridge Computers	Ridge
Spectrum Measurement Corporation	SMC
Spectrum Control, Inc.	SCI
Stauffer Japan, Ltd.	Stauffer
Tandy Corporation	Tandy
Wyse Technology	Wyse

List of Parties filing Reply Comments to MP-4

Party	Acronym
Amador Corporation	Amador
American Council of Independent Laboratories, Inc.	ACIL
American Telephone and Telegraph Company	AT&T
Standards Committee on Electromagnetic Compatibility, C63	C63
Carl T. Jones Corporation	CTJC
Computer and Business Equipment Manufacturers Association	CBEMA
E^3 Engineers, Inc.	E^3
Hewlett-Packard Company	HP
International Compliance Corporation	ICC
Motorola, Inc.	Motorola
NCR Corporation	NCR
R.R. Janwich	Janwich
Tandy Corporation	Tandy
The Keenan Corporation	TKC

APPENDIX B

PROPOSED MEASUREMENT PROCEDURES FOR THE PURPOSE OF SOLICITING COMMENT IN FCC GENERAL DOCKET NO. 88 - XXX DO NOT USE THIS DOCUMENT FOR DETERMINING COMPLIANCE

FEDERAL COMMUNICATIONS COMMISSION

FCC METHODS OF MEASUREMENT OF RADIO NOISE EMISSIONS FROM DIGITAL DEVICES

Federal Communications Commission
Authorization and Evaluation Division
7435 Oakland Mills Road
Columbia, MD 21046

FCC/OET TP-5 (1988) November 1988
(Supercedes MP-4 July 1987)

TABLE OF CONTENTS

Page

SECTION I - GENERAL
1.1 INTRODUCTION 4
1.2 APPLICABILITY 4
1.3 DEFINITIONS 4
1.4 CALIBRATION 6
1.5 REQUESTS FOR INTERPRETATIONS 7

SECTION II - TABLE - TOP EQUIPMENT

2.1 TEST ENVIRONMENT 8
2.1.1 Test Sites 8
2.1.2 Ambient EME 8
2.1.3 Temperature 8
2.1.4 Ground Plane 9

2.2 TEST INSTRUMENTATION AND EQUIPMENT 9
2.2.1 Measuring Receiver 9
2.2.2 Antennas 10
2.2.3 Line Impedance Stabilization Networks 10
2.2.4 Test Platforms 11

2.3 CONFIGURATION OF EQUIPMENT UNDER TEST 11
2.3.1 Minimum Configuration of Equipment Under Test 11
2.3.2 Interface Cables 11
2.3.3 Use of Interfacing Components and Simulators 12

2.4 LINE CONDUCTED EME MEASUREMENTS 12
2.4.1 Set-up 13
2.4.2 Testing for Conducted Emissions 15

2.5 RADIATED EME MEASUREMENTS 17
2.5.1 Preliminary Testing 17
2.5.2 Set-up 18
2.5.3 Testing for Radiated Emissions 19

2.6 DATA REPORTING/RECORDING REQUIREMENTS 22
2.6.1 Test Report 22
2.6.2 Recorded Measurements 23
2.6.3 Units of Measurement 23
2.6.4 Description of Alternate Methods and Conditions Used 23

SECTION III - FLOOR - STANDING EQUIPMENT

3.1 TEST ENVIRONMENT 24
3.1.1 Test Sites 24
3.1.2 Ambient EME 24
3.1.3 Temperature 24
3.1.4 Ground Plane 24

3.2 TEST INSTRUMENTATION AND EQUIPMENT 25
3.2.1 Measuring Receiver 25
3.2.2 Antennas 25
3.2.3 Line Impedance Stabilization Networks 25
3.2.4 Line Probe 25
3.2.5 Test Platforms 25

3.3 CONFIGURATION OF EQUIPMENT UNDER TEST 26
3.3.1 Minimum Configuration of Equipment Under Test 26
3.3.2 Interface Cables 26
3.3.3 Use of Interfacing Components and Simulators 26

3.4 LINE CONDUCTED EME MEASUREMEMTS 26
3.4.1 Set-up 26
3.4.2 Testing for Conducted Emissions 30

3.5 RADIATED EME MEASUREMEMTS 31
3.5.1 Preliminary Testing 31
3.5.2 Set-up 31
3.5.3 Testing for Radiated Emissions 34

3.6 DATA REPORTING/RECORDING REQUIREMENTS 36
3.6.1 Test Report 36
3.6.2 Recorded Measurements 37

3.6.3 Units of Measurement 38
3.6.4 Description of Alternate Methods and Conditions Used 38

REFERENCES 39

APPENDIX - VERIFICATION PROCEDURE FOR LINE IMPEDANCE STABILIZATION NETWORKS 40

A.1 MEASURING THE IMPEDANCE OF A LISN 40

A.2 MEASURING THE ATTENUATION OF A LISN 41

FIGURES
FIGURE 1 - IMPEDANCE VS FREQUENCY CHARACTERISTIC OF DESIRED LINE IMPEDANCE STABILIZATION NETWORK 42
FIGURE 2 - LINE CONDUCTED TEST CONFIGURATION FOR TABLE-TOP EQUIPMENT 43
FIGURE 3 - LINE CONDUCTED TESTING OF TABLE TOP-EQUIPMENT 44
FIGURE 4 - TEST PLATFORM FOR TESTING TABLE-TOP EQUIPMENT 45
FIGURE 5 - LINE PROBE FOR LINE CONDUCTED EME MEASUREMENTS 46
FIGURE 6 - TEST CONFIGURATION FOR FLOOR-STANDING EQUIPMENT 47
FIGURE 7 - TEST CONFIGURATION FOR FLOOR-STANDING AND TABLE-TOP EQUIPMENT COMBINATIONS 48
FIGURE 8 - USE OF OVERHEAD CABLE TRAYS DURING TESTING 49

SECTION I - GENERAL

1.1 *INTRODUCTION*

The procedures described herein set forth uniform methods for measurement of electromagnetic emissions (EME) from digital devices. Such equipment is to be measured for compliance with the limits for both conducted and radiated EME as set forth in the applicable portions of the FCC rules. This document presents two separate test procedures, one for table-top digital devices and one for floor-standing digital equipment, large distributed systems, and systems that use both floor-standing and table-top components. The table-top and floor-standing equipment test procedures are described in Sections II and III, respectively. Each of these procedures describes the environment, test instrumentation and equipment, requirements for the configuration of the equipment under test (EUT), test set-up, and measurement steps to be used in laboratory testing of digital devices for compliance with the FCC rules. In addition, the procedure for floor-standing equipment permits testing on-site at user installations and provides instructions for testing equipment at such locations.

1.2 *APPLICABILITY*

These procedures are to be used to determine compliance of digital devices with the EME limits specified in Part 15 of the FCC rules. Other procedures may be used provided that the party responsible for the equipment demonstrates that the methods used yields results that are expected to be the same as the results that would be obtained using these procedures. In the event of a dispute, the results of tests performed in accordance with the procedures described herein will prevail over the results of tests performed using other methods.

1.3 *DEFINITIONS*

The definitions in Parts 2 and 15 of the FCC rules and the following definitions apply for purposes of these test procedures. The definitions in the IEEE Standard Dictionary of Electrical and Electronics Terms, 2nd Edition, IEEE-100-1984, also apply. Where there are differences between the IEEE definitions and the FCC definitions, as set forth in the rules and herein, the FCC definitions shall take precedence.

1.3.1 *Digital device* (previously termed a computing device)- An unintentional radiator (device or system) that generates and uses timing signals or pulses at a rate in excess of 9,000 pulses per second and uses digital techniques; inclusive of telephone equipment that uses digital techniques and any device or system that generates and uses radio frequency energy for the purpose of performing data processing functions, such as electronic computations, operations, transformations, recording, filing, storage, retrieval, or transfer. A radio frequency device that is specifically subject to an emanation requirement in any other FCC rules or an intentional radiator subject to Subpart C of Part 15 of the FCC rules that contains a digital device is not subject to the standards for digital devices, provided the digital device is used only to enable operation of the radio frequency device and does not control additional functions or capabilities.

1.3.2 *Class A digital device* - A digital device that is marketed for use in a commercial, industrial or business environment, exclusive of a device that is marketed for use by the general public or that is intended to be used in the home.

1.3.3 *Class B digital device* - A digital device that is suitable for use in a residential environment. Examples of such devices include, but are not limited to, personal computers, calculators and similar electronic devices that are marketed for use by the general public. Digital devices marketed through a retail outlet or direct mail order catalog or for which notices of sale or advertisements are distributed or directed to the general public rather than restricted to commercial users shall be considered Class B devices. If the responsible party demonstrates that because of price or application a particular device is not suited for residential or hobby use, the device may be qualified as a Class A device.

1.3.4 *Table - top device* - A digital device that is normally used in a manner such that its full configuration is set-up on a desk, table or similar raised working surface or platform. Lap-top digital devices are considered table-top equipment for purposes of testing for compliance with the FCC rules.

1.3.5 *Floor - standing device* - A digital device that is normally used in a floor-standing configuration, that is, in direct contact with the floor or supported above the floor on a fixed surface such as a raised computer flooring system, or that is part of a large distributed system.

1.3.6 *Peripheral device* - An input/output unit of a system that feeds data into and/or receives data from the central processing unit of a device. Such equipment includes terminals, printers, floppy disk devices, other data storage devices, video monitors, keyboards, control cards, interface boards, memory expansion cards and other input/out devices that may or may not contain digital circuitry. Peripherals to a digital device include any device that is connected external to the device, any device internal to the digital device that connects the digital device to an external device by wire or cable, and, for the purpose of Part 15 of the FCC rules, any circuit board or card that increases the operating or processing speed of a digital device, e.g. "turbo cards" and "enhancement boards." However, an internal device that contains the central processing unit of a unit of equipment is not considered a peripheral device even where it provides direct connection to an external keyboard or other components.

1.3.7 *Personal computer* - A digital device that is capable of performing computations, can branch on condition, e.g., can perform "IF . . ., GO TO . . . " actions, and is suitable for use in the home, notwithstanding business applications. Such computers are considered Class B digital devices. Computers that can use a standard broadcast TV receiver as a display device, are designed to be portable, such as a laptop computer, or meet all of the following conditions are considered to be personal computers:

1) The device is marketed through a retail outlet or direct mail order catalog.

2) Notices of sale or advertisements for the device are distributed or directed to the general public or hobbyist users rather than restricted to commercial users.

3) The device operates on a battery or 110 volt electrical power source.

If the applicant or grantee demonstrates that because of price or application the computer is not suitable for residential or hobbyist use or, except for portable computers, controls the marketing of the equipment in such a manner as to ensure that final sale of the product is not to a residential operator, it may request that the computer not be considered a personal computer under the above definition.

1.4 *CALIBRATION*

The measuring instruments, cables, antennas, and test facility are to be checked and calibrated as necessary on a regular basis to ensure the accuracy of the test results. Antenna cables are to be checked for losses resulting from handling, frequent connection and disconnection, and exposure to the elements.

Antennas used in testing for radiated EME are to be calibrated for their free-space antenna factor to show traceability to the standard dipole antenna of the National Bureau of Standards. Antenna factors indicated by manufacturers may not generally be accurate, so all antennas should be individually calibrated.

The impedance and isolation of each Line Impedance Stabilization Network (LISN), sometimes also termed an artificial mains network, used in testing for conducted EME is to be measured in accordance with the procedure described in the Appendix at least once a year.

1.5 *REQUESTS FOR INTERPRETATIONS*

Parties seeking interpretations of the digital device regulations and/or of any aspect of the procedures set forth herein are invited to contact the FCC Digital Device Panel, c/o Federal Communications Commission, Authorization and Evaluation Division, 7435 Oakland Mills Rd., Columbia, MD 21046.

SECTION II - TABLE TOP DEVICES

The test procedure described in this section is to be used to measure the conducted and radiated EME of table-top digital devices as defined in 1.3.4 above.

2.1 *TEST ENVIRONMENT*

2.1.1 *Test Sites* - Conducted EME measurements may be made at any suitable facility, including a shielded room, provided the facility otherwise meets the requirements for a proper test environment as specified below. Radiated EME measurements of the EUT should be made on an open area test site meeting the minimum requirements described in FCC/OET Bulletin 55. [5] An alternative site may be used for radiated EME measurements provided that the results are correlated satisfactorily to those that would be obtained on an open area test site. A shielded room is not acceptable for making radiated EME measurements unless it is properly lined with EME absorbing material to eliminate reflections of emissions.

2.1.2 *Ambient EME* - It is desirable that the level of both the conducted and radiated ambient EME at the test site be at least 6 dB below the FCC limits for the EUT. It is, of course, not always possible to meet this condition. If the ambient field and/or power line level at some frequencies within the specified measurement ranges are too high, it is recommended that one or more of the following corrective steps be employed:

1) Perform measurements at the closest distance permitted by far field considerations and convert the results to the specified limit distance.

2) Perform measurements of critical frequency bands during hours when broadcast and other radio stations are off-the-air and ambients from industrial equipment are lower.

3) Perform measurements in a room lined with EME absorbing material. Note: Measurements made in a non-absorber lined shielded (metal) enclosure are not acceptable for the purpose of determining compliance with radiated EME limits.

4) Insofar as is possible, orient the axis of an open area test site to discriminate against strong ambient signals.

5) Vary the bandwidth of the measuring instrument to separate ambient EME from emissions from the EUT.

2.1.3 *Temperature* - The ambient temperature of the testing area should be within the range of 10 to 40 degrees Celsius (50 to 104 degrees Farenheit) unless the particular equipment requirements specify testing over a different temperature range.

2.1.4 *Ground Plane* - A ground screen is required where line conducted EME tests are performed at laboratory facilities, but is not mandatory where the tests are performed at an on-site installation of the EUT. This ground screen is to consist of a floor and and at least one vertical earth-grounded conducting surface, e.g. the metal floor and a metal wall of a shielded test chamber. Each of these conducting surfaces is to be at least 2.0 x 2.0 meters in size. The part of the ground plane on the floor of the facility is to be covered by insulating material 3 millimeters thick, e.g. rubber matting or floor tile.

A ground screen is highly recommended, but not mandatory, for measurement of radiated EME. Open area test sites are likely to need a ground screen when any of the following conditions exist at the site:

1) The terrain is discontinuous.

2) The terrain is subject to extreme seasonal variations in ground conductivity.

3) There are unburied power or control cables on the site.

4) The site is located on pavement.

2.2 *TEST INSTRUMENTATION AND EQUIPMENT*

2.2.1 *Measuring Receiver* - EME measurements are to be made with a radio noise meter conforming to the instrumentation in reference [1]. Measurements at or below 1000 MHz are to be made with the quasi-peak detector function on the measuring instrument. Measurements above 1000 MHz are to be made with the peak detector function on the measuring instrument. Other instrumentation such as a spectrum analyzer may be used for making these measurements. However, measurements taken with a radio noise meter that employs the quasi-peak detector function are preferred over measurements taken with other instrumentation.

When a spectrum analyzer is used as the measuring instrument, appropriate accessories should be employed to provide sufficient sensitivity and overload protection to insure accurate and repeatable measurements of all emissions over the entire specified frequency range. The accessories needed will depend upon the specific measurement task and may include preamplifiers for improving sensitivity, filters and attenuators for overload protection, and additional quasi-peak detection circuitry. In this case, overload is harmonic distortion, intermodulation, or gain compression of spectrum analyzer input signals. If a post-detector filter is used, its bandwidth must be wide enough so as not to affect peak detector readings. Prior to taking final measurements, it may be necessary to take precautions to ensure that the spectrum analyzer operates linearly. The user's manual of the spectrum analyzer should be reviewed for instructions and guidance in this area. Application notes on the use of spectrum analyzers and other measurement instruments also are available from several manufacturers of this type of equipment.

Automatic scan techniques may be used, but the maximum scan speed is to be limited by the response time of the measuring system and, where applicable, the repetition rate of the emissions being measured to ensure that the maximum levels of all emissions are measured. Where such techniques are employed, extreme caution must be exercised to ensure that each emission is maximized.

2.2.2 *Antennas* - Measurements of radiated EME are to be made using the following antennas:

Frequency Range	Antenna Type
30 to 1000 MHz	Tuned half-wave dipole
Above 1000 MHz	Linearly polarized horn

The antennas used are to be capable of measuring both horizontal and vertical polarizations over the specified frequency range. Any other type of linearly polarized antenna may be used to take measurements between 30 and 1000 MHz provided that the measurements are correlated satisfactorily to a tuned dipole.

It is recommended that the test antenna be mounted on a stand that will facilitate raising and lowering of the antenna from 1 to 4 meters in height in an even, continuous manner and convenient reorienting of the antenna from the horizontal to the vertical plane.

2.2.3 *Line Impedance Stabilization Network* - Measurements of the RF noise voltage on each conductor of the AC power cord of the EUT are to be made with the EUT connected to the public utility power lines through a 50 Ohm/50 uH LISN with the impedance characteristics shown on Figure 1. Any unit that provides the impedance characteristics shown on Figure 1 may be used. In addition, any peripheral or other support components also are to be connected to the power service through one or more additional LISNs. The power supply line for each LISN used is to be 3.0 meters in length and this cord must be shielded. A separate LISN is required for each AC power conductor of the EUT. Each unit is to have a coaxial-type connector that provides a 50 ohm terminating impedance for connection of the measuring instrumentation. LISNs are not to be used in measuring radiated EME.

Commercial LISNs are either single section units with screw terminals or multi-section units that may have either screw terminals or an integral AC outlet. Where it is necessary to add an external AC outlet to a LISN with screw terminals, the outlet must be connected with low-impedance leads that are the minimum length necessary to connect the EUT to the LISN, e.g. 3 inches. The short leads are necessary to maintain the rated impedance of the LISN.

2.2.4 *Test Platforms* - During testing, table-top digital devices are to be placed on a non-conducting rectangular table or platform 1 x 1.5 meters in size and 0.8 meters in height. For radiated EME measurements, the table used is to be capable of rotating 360 degrees and is to provice AC outlets on the rotator surface. A remote control turntable is recommended for convenience and accuracy in testing.

2.3 *CONFIGURATIONOF EQUIPMENT UNDER TEST*

2.3.1 *Minimum Configuration of Equipment Under Test* - The EUT shall be configured in a manner representative of the equipment as typically used. A digital device marketed to be operated as a stand-alone device is to be tested by itself. Conversely, a digital device designed and marketed to be operated as part of a multi-unit system shall be tested with all the peripherals, accessories, con-

necting cables, etc. normally used with the device attached to it and operating to the extent possible in a manner that is representative of actual use.

If the EUT is a personal computer or a personal computer peripheral, it shall be tested in a system configuration consisting of the following minimum system of components:

1) Personal computer (CPU)

2) Keyboard

3) External monitor (display screen)

4) External peripheral for either a serial or parallel interface port. Internal modems do not satisfy the requirement for an external serial peripheral.

In cases where the EUT combines one or more, but not all, of the above components into a single unit, e.g. a personal computer and keyboard, it is only necessary to use the separate components necessary to complete the minimum system. If a personal computer that is built with interface port capabilities to accept additional cards or peripherals but is not equipped with the interface ports necessary to form a minimum system, ports shall be added to it to facilitate formation of a minimum system for purposes of testing. If a personal computer is equipped with more than the minimum number of interface ports, peripherals are to be connected to all ports. However, where the applicant or grantee provides satisfactory justification that connection of peripherals to the additional ports will not cause the unit to exceed the applicable FCC emissions limits it will be necessary only to connect peripherals to the ports that satisfy the minimum system requirements.

2.3.2 *Interface Cables* - A digital device with interface ports is to be connected to each peripheral, or associated peripheral or personal computer in cases where the EUT is a peripheral, by an interface cable. Interface cables are to be of the type and length recommended for use with the equipment as marketed or as otherwise specified by the manufacturer of the equipment. If multiple lengths of cable may be used interchangeably with the equipment, the cables used are to be of the length that maximizes emissions.

2.3.3. *Use of Interfacing Components and Simulators* - In cases where the EUT is part of a system of interfacing units, the following guidelines are to be used in configuring the EUT for testing:

1) Simulators are not to be used in determining the compliance of a device subject to certification.

2) If the EUT is a peripheral that is being separately measured for compliance, the unit is to be tested with at least one computer in the minimum configuration described in 2.3.1. It is not necessary to test the EUT with all compatible computers or peripherals.

3) If the EUT is designed to be used with a specific computer or peripheral, it is to be tested with that computer or peripheral.

4) To the extent possible, the computer and/or the peripherals (support equipment) that form the test system for the EUT are to be equipment marketed by the EUT manufacturer. The specific support equipment used with the EUT in the test also is to be of a type typically used with the EUT in normal operation.

5) The support equipment for the EUT *is not* to be modified in order to enable the EUT to achieve compliance unless the modified device(s) will be marketed with the EUT.

6) Equipment marketed as a system is to be tested as a system.

7) Because of the added degree of measurement uncertainty that is present when a simulator is employed in the testing process, use of such devices is to be avoided to the extent possible. If the EUT is a Class A device, a simulator may be used when the logistic circumstances of the equipment installation or the measurement facility would make the use of actual interfacing units impractical. However, it is important that any simulator used properly represent the electrical characteristics, such as impedances and RF signals, of the device for which it is substituted. In addition, any electrical interaction between the EUT and the actual interface unit due to mechanical characteristics should be identified and duplicated.

2.4 *CONDUCTED EME MEASUREMENTS*

If the EUT has no provision for connection to the public utility AC power lines, line conducted measurements are not required.

Line conducted measurements are to be made in accordance with the following procedure:

2.4.1 *Set - up*

Step 1)

Place the EUT atop the table or platform specified in 2.2.4. Set the test table up on an earth-grounded conducting surface as specified in Section 2.1.4 above and position it 0.4 meters from one earth-grounded vertical conducting surface. The EUT is not be closer to any other earth-grounded surface than 0.8 meters (*See* Figures 2 and 3).

Step 2)

Arrange the EUT on the table in a position as typical of normal use as possible and prepare it for operation, i.e. connect any component support units with cabling as specified in Section 2.3.2. If the EUT is a multi-component personal computer system, the components are to be positioned on the table in the following manner (*see* Figure 4):

a) Personal computer- If the personal computer is an individual component, it is to be located in the center along the back edge of the table. If it is part of a composite unit that includes the monitor screen, the unit is to be located in the center of the table. If the personal computer is a part of composite unit that includes the keyboard but not the monitor, the unit is to be located in the center along front edge of the table, oriented as it would in typical usage. If the personal computer is normally located on the floor, it is to be placed in the center along the back edge of the test platform.

b) Keyboard- If the keyboard is a separate component, it is to be located directly in front of the personal computer/monitor and oriented as it would be in typical usage.

c) Component (external) monitor- The monitor is to be placed on top or the computer where it is appropriate to do so. Where this position is not appropriate, the monitor is to be positioned directly behind the computer.

d) Component (external) peripheral for either a serial or parallel port- Peripheral devices are to be located on the sides of the computer/monitor.

Other arrangements are acceptable where the EUT is designed to be positioned for use in a manner other than that described above, e.g. where the personal computer and one or more peripherals are part of a composite device that would be designed to be located on the side of the monitor and keyboard. In such cases, the EUT is to be arranged on the test table as it would be in typical usage.

Step 3)

Record the arrangement of the equipment on the test table. This is to include a diagram indicating the positions of the individual units of equipment, the distances between adjacent units and the distances to the edge of the table. Photographs clearly showing the position of the equipment on the test table may be used in addition to a diagram.

Step 4)

Bundle interface cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter lengths until the cable is one meter long. Each such interface cable is to be bundled individually. Interface cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless such cables are marketed with the EUT. It is not necessary to bundle interface cables that are permanently coiled.

Step 5)

Line conducted EME measurements are to be made with the EUT connected to the public utility lines through a nominal, standardized impedance, which is to be provided through a LISN as described in Section 2.2.3. The EUT power cord is to be connected directly to the LISN for these measurements even if the EUT normally receives power through another device in the system. AC power to the LISN is to be filtered to eliminate ambient RF voltages. Install an appropriate filter on the AC utility power source. Connect the EUT power cord to the appropriate port on the LISN and connect the LISN to the filter on the AC utility power source. Electrically bond the LISN enclosure(s) and AC power filter to the ground plane. Terminate unused RF ports on the LISNs into 50 ohms.

If the EUT is not provided with a power cord, the unit is to be connected to the LISN by a power cord of the type specified by the manufacturer. This power cord is to be no longer than 2.0 meters. If a non-flexible power cord is provided with the EUT, it is to be cut to the length necessary to attach the EUT to the LISN.

Step 6)

Drape the AC power cord of the EUT over the rear edge of the table and allow it to hang down vertically to the top of the LISN. Wrap excess power cord in a figure "8" pattern around 2 non-metallic pegs that are 9 centimeters high, approximately 2 centimeters in diameter, spaced 10 centimeters on center apart and attached to the top of the LISN (*See* Figure 3). If the EUT is provided with a permanently coiled power cord, bundling of the cord is not required.

Step 7)

Peripheral or other equipment used to complete the EUT system is to be powered through a second LISN. This equipment is to be powered through a second LISN even where the EUT is provided with AC outlets for supplying power to peripheral devices. AC power for all LISNs is to be obtained from the same filtered source. Connect any peripheral and other equipment associated with the EUT to a second LISN. Additional LISNs may be used, as necessary, to supply power to other peripheral equipment, provided that the number of additional LISNs used is kept to a minimum. Supply lines to the LISNs are to be of the lengths specified in Figure 2 and must be shielded. Terminate unused RF ports on the LISN(s) into 50 ohms.

Step 8)

Drape AC power cords of peripherals onto the insulating material that covers the ground plane. No power cords from peripheral equipment are to be draped over the top of a LISN.

Step 9)

Ground the EUT in accordance with the manufacturer's operating instructions. It the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground position of a three prong plug is to be connected to the ground plane.

Step 10)

Connect the measuring instrument to a section of the LISN supplying power to the EUT using a suitable length of coaxial cable. The input to the measuring instrument will be transferred in the testing to LISN sections connected to other current carrying conductors of the EUT to measure the line conducted emissions on those conductors.

2.4.2 ***Testing for Conducted Emissions***

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Set the 6 dB bandwidth of the measuring instrument to not less than 9 kHz for conducted EME tests and the detector function of that unit to the quasi-peak mode.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure the conducted EME of the EUT. Measurements are to be made by tuning the measuring instrument in a continuous manner over the range 0.45 MHZ to 30 MHz. Note that if the quasi-peak level of an emission as measured in the quasi-peak mode is 6 dB, or more, higher than the level of the same emission measured with the instrumentation detector function set to the average mode and the bandwidth at the same setting the same as the quasi-peak bandwidth, that emission is considered broadband. In such cases, a 13 dB reduction in the quasi-peak emission level may be made for comparison with the appropriate limit. Where high level emissions are observed, test engineers are advised to re-examine those emissions with the instrumentation in the the average mode and to employ the 13 dB reduction for broadband band emissions where the above conditions are met.

Each emission is to be maximized by varying the mode of operation, clock or data exchange speed and software programming, where applicable. Two modes of operation are to be examined for every EUT:

a) The EUT powered on and awaiting data input/output.

b) The EUT receiving/sending data in a typical operation.

If the EUT is a personal computer or a personal computer peripheral, the following additional software and and operating conditions are to be used in testing the device:

a) A simple Basic language program that generates a complete line of continuously repeating "H" (upper case h) is to be used as the software test program. This pattern is to alternately sent to the video port device, the parallel port device or serial port device, and written (saved) and read (loaded) to the disk drive(s) to observe which operating condition mazimizes each emission. Each peripheral must be exercised independently.

b) Monitors are to be set to display the "H" pattern in white letters on a black background. If the monitor cannot be set to display the "H" pattern in this way, is is to be set to display the pattern using illuminated letters on a non-illuminated background. The monitor's contrast control is to be set to maximum and its brightness control is to be set to raster extinction or maximum, whichever provides maximum brightness without visible raster retrace.

c) The "H" pattern is to be sent to printers during testing.

Maximize each emission individually by rearranging the interconnecting cables. If the EUT is a Class A device, record the 3 highest emission levels on each conductor of the EUT in the range 0.45 to 1.705 MHz and the 3 highest emission levels on each conductor of the EUT in the range 1.705 to 30 MHz. If the EUT is a Class B device, record the 6 highest emission levels on each conductor of the EUT in the range 0.45 to 30 MHz. Also record the positions of the interface cables associated with those observations. Photograph the positions of the cables associated with the highest emissions level. If either of the maximum emissions levels, in the case of a Class A devices, or the maximum level, in the case of a Class B device, the exceed the FCC limit(s), the device must be redesigned before the equipment can comply with the FCC technical rules. The FCC line conducted emissions limits are:

Class A Devices - On any frequency or frequencies within the band 450 kHz to 1.705 MHz, the line conducted voltage shall not exceed 1000 microvolts; on any frequency or frequency or frequencies within the band 1.705 MHz to 30 MHz, the line conducted voltage shall not exceed 3000 microvolts. The 1000 microvolt limit applies at the boundary frequency 1.705 MHz.

Class B Devices - On any frequency or frequencies within the band 450 kHz to 30 MHz, the line conducted voltage shall not exceed 250 microvolts.

Step 5)

Record the measurements in accordance with the data recording/reporting requirements specified in Section 2.6.

Step 6)

Transfer the input to the measuring instrument to the section of the LISN connected to the next current carrying conductor of the EUT to be measured. Repeat Steps 2, 3, 4 and 5. Perform this step for each current carrying conductor of the EUT.

2.5 *RADIATED EME MEASUREMENTS*

All radiated EME from the EUT, including those from system components and interconnecting cables, are to be measured.

2.5.1 *Preliminary Testing* - It is often useful to perform preliminary radiated EME tests at a distance closer than that specified in the applicable standards to determine the EME characteristics of the EUT. At nearer distances, it is sometimes easier to determine the spectrum signature of the EUT and, in some instances, the positions of cables that produce the maximum level of emissions. A site other than an open field site or equivalent facility may be used for this purpose. However, the test engineer should be aware that alternate sites may not produce results that correlate with results obtained at the required site. During preliminary testing, the EUT should be set-up in the same arrangement and operated in the same manner that will be employed in the actual radiated tests. A spectrum analyzer and broadband antennas are often useful for this type of testing. If a radio noise meter is used in preliminary testing, it is recommended that either headphones or a loudspeaker be connected as an aid in detecting ambient signals and finding frequencies of significant emissions

from the EUT. Care must be taken not to miss any significant EME from the EUT during the preliminary tests.

2.5.2 ***Set - up***

Step 1)

Place the EUT atop the non-conducting table or platform specified for radiated tests in Section 2.2.4. Locate the table on a test site meeting the conditions for radiated tests specified in Section 2.1.1. It is recommended that a ground screen be used in testing for radiated emissions.

Step 2)

Arrange the EUT on the table in a position as typical of normal use as possible and prepare it for operation. i.e. connect any component support units with cabling as specified in Section 2.3.2. If the EUT is a multi-component personal computer system, the components are to be positioned on the table in accordance with the instructions in Step 2 of Section 2.4.1 and Figure 4.

Step 3)

Record the arrangement of the equipment on the test table. This is to include a diagram indicating the positions of the individual units of equipment, the distances between adjacent units and the distances to the edge of the table. Photographs clearly showing the position of the equipment on the test table may be used in addition to a diagram.

Step 4)

Bundle interface cables that are longer than 1 meter in a serpentine fashion in their center, using 30 to 40 centimeter loops until the cable is one meter long. Each such interface cable is to be bundled individually. Interface cables shorter than one meter in length are not to be bundled during testing. Cables shorter than 1 meter are not to be used for testing unless such cables are marketed with the EUT. Interface cables that are permanently coiled are not required to be bundled.

Step 5)

Connect the EUT and its support equipment to the AC outlets on the rotator surface of the test table. The EUT power cord is to be connected directly to an AC outlet on the test table for these measurements even if the EUT normally receives power through another device in the system. Allow excess power cord lengths to hang down vertically over the rear edge of the table top to lie unbundled on the rotator surface.

If the EUT is provided with one or more AC outlets that can be used to power a peripheral, the radiated EME tests are to be made with the power cords of the appropriate the peripheral(s) (usually a monitor) connected to the AC outlet(s) on the EUT.

Step 6)

Ground the EUT in accordance with the manufacturer's operating instructions. If the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground position of a three prong plug is to be connected to ground at the AC outlet on the rotator.

Step 7)

Determine the appropriate frequency range over which to measure the EME of the EUT from the following:

EUT Highest Internally Generated Frequency	Frequency Range of Measurements
1.705 - 108 MHz	30 - 1000 Mhz
108 - 500 MHz	30 - 2000 MHz
500 - 1000 MHz	30 - 5000 MHz

Step 8)

Set up the measuring receiver and the antenna for measuring emissions in the range 30 to 1000 MHz, with connection of the antenna to the receiver through an appropriate length of coaxial cable. Locate the antenna at the distance from the EUT for a Class A or Class B digital device as appropriate. This distance is measured as the horizontal distance from: 1) the nearest point on the antenna to the EUT when the antenna is oriented to receive emissions from that device; to 2) the point on the test table nearest the antenna over a complete rotation. For the 1.0 x 1.5 meter test table, the nearest point of the table to the test antenna will be a corner (the corners of the table are approximately 0.9 meters from the table center).

For Class A digital devices, the distance between the antenna and the EUT is to be 30 meters. For Class B digital devices, the distance is to be 3 meters. If it is impractical to measure at these distances because of size, location, etc., measurements may be made at other distances, provided that the EUT is substantially in the far field.

2.5.3 ***Testing for Radiated Emissions***

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Prepare to measure emissions in the frequency range 30 - 1000 MHz by setting the 6 dB bandwidth of the measuring instrument to at least 100 kHz and the detector function of that unit to the quasi-peak mode.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure radiated EME over the range 30 - 1000 MHz. Search for emissions by tuning the instrument in a continuous manner over this range. While performing the measurements it may be necessary to change bandwidths on the measuring instrument as the area of spectrum examined changes. The bandwidth must not be set at less than 100 kHz.

Each emission is to be maximized individually by varying the mode of operation, clock or data exchange speed and software programming, where applicable. Two modes of operation are to be examined for every EUT:

a) The EUT powered on and awaiting data input/output.

b) The EUT receiving/sending data in a typical operation.

If the EUT is a personal computer or a personal computer peripheral, the following additional software and and operating conditions are to be used in testing the device:

a) A simple Basic language program that generates a complete line of continuously repeating "H" (upper case h) is to be used as the software test program. This pattern is to alternately sent to the video port device, the parallel port device or serial port device, and written (saved) and read (loaded) to the disk drive(s) to observe which operating condition mazimizes each emission. Each peripheral must be exercised independently.

b) Monitors are to be set to display the "H" pattern in white letters on a black background. If the monitor cannot be set to display the "H" pattern in this way, it is to be set to display the pattern using illuminated letters on a non-illuminated background. The monitor's contrast control is to be set to maximum and its brightness control is to be set to raster extinction or maximum, whichever provides maximum brightness without visible raster retrace.

c) The "H" pattern is to be sent to printers during testing.

Maximize each emission by rearranging the interconnecting cables of the EUT, rotating the test table though 360 degrees, raising and lowering the antenna from 1 to 4 meters, and again rearranging the interconnecting cables, again rotating the test table 360 degrees until the emissions are maximized. Repeat this process for the other polarity of the measurement antenna i.e. horizontal first, then vertical.

Record the maximum emissions levels observed with the antenna in the horizontal and vertical positions in each frequency range specified in the FCC limits, e.g. 30 - 88 MHz, 88 - 216 MHz, 216-960 MHz and above 960 MHz. If any of these maximum levels exceed the FCC limits, the device must be redesigned before the equipment can comply with the FCC technical rules. Record and photograph the positions of the test table, antenna, and cable associated with the individual maximum EME measurements. The FCC digital device radiated emissions limits are:

Class A Devices - The field strength at a distance of 30 meters shall not exceed:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	30
88 - 216	50
216 - 960	70
Above 960	100

Class B Bevices - The field strength as a distance of 3 meters shall not exceed:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	100
88 - 216	150
216 - 960	200
Above 960	500

The tighter limits apply at the band edges.

If the highest operating frequency of the EUT is less than or equal to 108 MHz, proceed to Step 7.

Step 5)

Prepare to measure emissions above 1000 MHz. Connect the antenna for measuring emissions above 1000 MHz to the measuring receiver and set it up at the proper distance from the test table as specified Step 8 of Section 2.5.2. Set the 6 dB bandwidth of the measuring receiver to at least 1 MHz and the detector function of that unit to the peak mode.

Step 6)

Measure emissions above 1000 MHz up to the maximum measurement frequency for the EUT, as determined in Step 7 of Section 2.5.2 above, using the measurement scheme described in Step 4 above. Record the maximum emission levels observed with the antenna in the horizontal and vertical positions for the frequency ranges 1000 - 2000 MHz and 2000 - 5000 MHz, up to the highest frequency examined. Photograph the test set-up and interface cable arrangement for the highest level of emissions observed in each of the frequency intervals examined. If any of these maximum levels exceed the FCC limits, the device must be redesigned before it can comply with the FCC technical rules.

Step 7)

Record the data in accordance with the data recording/reporting requirements specified in Section 2.6.

2.6 *DATA REPORTING / RECORDING REQUIREMENTS*

2.6.1 *The Test Report* - The test report for table-top equipment is to contain the following information:

1) The location of the test sites used for the line conducted and radiated measurements and whether these sites were laboratory facilities or on-site locations.

2) Identification and description of the instrumentation and equipment used to perform the test. This is to include identification of the type of antenna(s) used for measuring radiated emissions.

3) Specific identification, including the FCC ID's if applicable, of the EUT and, in the case of multi-component systems, all equipment used in the system with the EUT.

4) Descriptions of the length and construction of each interface cable. The report is to indicate whether cables are shielded or unshielded, have plastic or metallic hoods, have ferrite beading, etc.

5) Diagrams of the positions of the equipment on the test table in both the conducted and radiated emissions tests.

6) A description of any alternative methods used in the testing, in accordance with the specifications in Section 2.6.4.

7) The test results and associated comparative information presented in accordance with the specifications in Sections 2.6.2 and 2.6.3.

8) A description of any modifications made to the EUT or other system components during the testing.

9) The party who performed the tests.

10) The date the tests were performed.

11) A statement signed by the individual responsible for the test that the EUT as tested complies or does not comply with the applicable FCC rules.

12) A statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device tested that the unit tested is representative of the equipment that will be marketed.

Note: In the case of devices required to be certificated, refer also to Part 2 and Part 15 of the FCC rules for general information requirements pertaining to all applications for certification.

2.6.2 *Recorded Measurements* - The 6 highest emissions observed on each conductor of the EUT power cord in the line conducted emissions test and the highest emissions measured with the antenna(s) in the horizontal and vertical planes in each of the frequency ranges examined in the radiated emissions test are to be recorded in the test report. In addition, the report is to include the diagrams of the interface cable positions and, for radiated emissions, the table and antenna positions associated with those emissions. These diagrams are to be in in sufficient detail to allow repeatability of the test results to within +/- 2 dB. Also include the photographs of the EUT and interface cables for the individual maximum measured emissions in the line conducted and radiated EME tests. If taken, photographs of the test set-up for all of the reported measurements may be included. The measurement results and the FCC limits for Class A or Class B digital devices, as appropriate, are to be presented in tabular form for comparison purposes. If a graphic presentation of the data is available, i.e. a plot from a spectrum analyzer, it should be incorporated into the test report also.

2.6.3 *Units of Measurement* - Measurements of line conducted EME are to be reported in units of microvolts or dB referenced to one microvolt (dBuv). Measurements of radiated EME are to be reported in units of microvolts per meter (uV/m) or dB referenced to 1 microvolt per meter (dBuV/m) at the distance specified in the FCC rules. The indicated readings on the measuring instrument are to be converted to microvolts, dBuV, uV/m or dBuV/m by use of appropriate conversion factors. All formulas of conversions and conversion factors are to be included in the measurement report. Radiated measurements taken at alternative distances are to be converted to the limit distance using the inverse relationship of 20 dB/decade.

2.6.4 *Description of Alternate Methods and / or Conditions Used* - If an alternate test method is used, the test report must identify and describe that method, provide justification for its use, and describe how the results obtained through its use correlate with the methods specified herein. Instrumentation, instrument attenuator and bandwidth settings, detector function, EUT arrangement, and all other pertinent details of the test are to be provided. Where automatic scan techniques are used, an explanation of how each emission from the EUT was maximized and the scan rate used to obtain each recorded emission is to be included in the test report.

SECTION III - FLOOR STANDING - EQUIPMENT

The test procedures described in this section are to be used to measure the conducted and radiated EME of floor-standing digital devices as defined in Section 1.3.5 and digital devices that are normally part of a large distributed system (both types of devices are collectively referred to herinafter as floor standing equipment). A system that combines floor-standing and table-top components is to be tested as a floor-standing unit. Testing of an installed EUT may be performed at a user location where it is impractical to test the unit or system on a standard test site. In such cases, the FCC considers the equipment and location together to be the EUT. The conducted and radiated EME in such cases are unique because site containment properties affect both the measurement procedure and the EME of the equipment. Where a given system is tested and found to be in compliance with the FCC EME limits at three typical on-site locations, the FCC considers the combined test results to be representative of all similar installations and, therefore, that the EUT does not have to be retested to demonstrate compliance at similar locations.

3.1 *TEST ENVIRONMENT*

3.1.1 *Test Sites* - In general, the test site for floor-standing equipment is to conform to the specifications for table-top devices in section 2.1.1. As indicated above, where it is impractical to test a unit or system on a standard test site, the equipment may be tested on the premises of an end user or other "on-site" installation.

3.1.2 *Ambient EME* - The ambient EME instructions for table-top devices in Section 2.1.2 apply for floor-standing equipment.

3.1.3 *Temperature* - The instructions concerning temperature for table-top devices in Section 2.1.3 apply for testing floor-standing equipment.

3.1.4 *Ground Plane* - In general, the ground plane instructions for table-top devices in Section 2.1.4 apply for testing floor-standing equipment. However, for floor-standing systems the minimum dimensions of the horizontal conducting surface that forms the ground plane for line conducted EME tests is to be of sufficient size to extend 0.5 meters beyond the EUT. No vertical conducting surface is required for line conducted EME measurements on floor-standing digital devices. A ground plane is recommended for use at the site where radiated EME measurements are made. This configuration will permit line conducted EME measurements to be performed at the same location as the radiated measurements, thus avoiding the need to move the equipment and set it up again at a second location. It is not necessary to install a ground plane where the testing is performed at an on-site user location.

3.2 *TEST INSTRUMENTATION AND EQUIPMENT*

3.2.1 *Measuring Receiver* - In general, the measuring receiver instructions for table-top devices in Section 2.2.1 apply for testing floor standing equipment.

3.2.2 *Antennas* - The antenna specifications and recommendations for table-top EUTs in Section 2.2.2 apply for testing floor-standing equipment.

3.2.3 *Line Impedance Stabilization Networks* - The specifications for LISNs in Section 2.2.3 apply for testing of floor-standing equipment.

3.2.4 *Line Probe* - A line probe is to be used to make line conducted measurements in cases where the testing is performed at a user installation or a LISN cannot be used due to high voltage or current requirements by the EUT. The method to be used for the line probe is shown on Figure 5. When using a line probe, special care must be exercised to establish a reference ground for the measurements.

3.2.5 *Test Platforms* - For line conducted EME tests, the equipment may be placed on any suitable surface that is convenient for use with the required ground plane. For radiated EME tests, the preferred surface for floor-standing EUTs is a rotating platform that is flush with the ground plane or surface. A remote control platform is recommended for convenience and accuracy in testing. For systems always used on specially designed computer flooring, it is permissible to test with the EUT mounted on that flooring, subject to the following conditions. Non-metallic floors are to be installed at their normal height, but in no case are to be higher than 0.5 meters above the ground plane. If the floor is metal, it is to be installed flush with the ground plane. Where a specially designed raised computer floor is used, the interface cables may be placed below that floor. It is also acceptable to position the equipment directly on a stationary, or non-rotating, surface or ground plane of a test site. In such cases, it will be necessary to use the less convenient test radial method described below in Step 4 of Section 3.5.3 to perform the radiated EME measurements.

Note: The use of a raised floor may affect site attenuation and therefore render a site unacceptable pursuant to OST 55 guidelines. To avoid this problem, careful attention should be paid to the construction and grounding on such flooring. An acceptable alternative where this problem cannot be readily resolved is to resort to on-site testing.

If the EUT is a system with one or more table-top components, those units are to be positioned on one or more tables 0.8 meters in height and of suitable surface area to accommodate the component units.

3.3 *CONFIGURATION OF EQUIPMENT UNDER TEST*

3.3.1 *Minimum Configuration of Equipment Under Test* The EUT is to be configured in a manner representative of the equipment as typically used. A floor-standing device designed to be operated as a stand-alone unit is to be tested by itself. Conversely, a unit designed to be operated as part of a multi-unit system is to be tested with a complement of the peripherals, cabling, and other operating accessories typical of those with which it would be used to form a complete system in normal use.

3.3.2 *Interface Cables* - Where the EUT is a multi-component system, or part of such a system, the individual system components are to be interconnected by cabling of the type and lengths specified by the manufacturer of the equipment.

3.3.3 *Use of Interfacing Components and Simulators* - In cases where the EUT is part of a system of interfacing units, the guidelines concerning use of interfacing components and simulators in Section 2.3.3 for table-top EUTs are to be used in configuring large digital systems for testing.

3.4 *LINE CONDUCTED EME MEASUREMENTS*

If the EUT has no provision for connection to the public utility AC power lines, line conducted measurements are not required.

Line conducted measurements are to be made in accordance with the following procedure:

3.4.1 *Set - up*

Step 1)

Place the EUT on a suitable earth-grounded platform, surface, or raised floor as specified in 3.1.4 or 3.2.5. The EUT may be tested for line conducted EME on an open field test site or other site not equipped with a vertical conducting surface. If a vertical conducting surface is present on the line conducted measurement site, it is to be no closer than 2.0 meters to the EUT. If the EUT is a system with table-top components, locate the table-top unit(s) on a table or tables as specified in Section 3.2.5. All floor-standing units and tables supporting table-top units are to be positioned on the same platform, surface, or raised floor. Position the equipment in an arrangement typical of normal use. (*See* Figures 6 and 7.)

Where on-site testing is performed, the EUT is to be tested in the configuration in which it is installed over its work surface. No alterations are to be made to the EUT or the floor upon which it is installed.

Step 2)

Prepare the equipment for operation, e.g. connect any component support units with cabling as specified in Section 3.3.2. Allow interface cables to drop vertically from component units to a raised non-conducting surface 25 centimeters above the test platform or floor, run horizontally across this surface and vertically up to interfacing components. Interface cables longer than these distances are to be arranged in the space between the components in a serpentine fashion atop the raised surface using loops 30 to 40 centimeters long. Each interface cable is to be arranged individually. (*See* Figures 6 and 7.) Where it is impractical to arrange interface cables in the above manner because of bulk, stiffness or other reasons, the cables may be laid out in the center of a cable run in any convenient pattern.

Overhead cable trays and remote peripherals may be used as shown on Figure 8 where such equipment is typically used with the EUT in normal installations. Cable trays used in testing are to be typical of those used with the system. Where overhead cable trays are used, route the interface cables up onto and down from the trays in an appropriate manner, looping any excess lengths of cable in the trays in the manner described above. Cables of remote peripherals are to run directly from the point

where they exit the EUT enclosure to a point 1.5 meters behind the EUT and 1.0 meter above the ground plane. From this point, they are to drop vertically to the raised surface 25 centimeters above the floor of the test facility, then run directly to a point where they exit the test facility, either in the center of the turntable or directly above the EUT. Remote peripherals are to be located at a distance from the EUT that is typical of normal use.

Where on-site testing is performed on-site, do not move equipment or otherwise alter the arrangement or positions of the interface cables and equipment specifically for the testing.

Step 3)

Line conducted EME measurements generally are to be made with the EUT connected to the public utility lines through a nominal, standardized impedance, which is to be provided through a LISN as described in Section 2.2.3. The EUT power cord is to be connected directly to the LISN for these measurements even if the EUT normally receives power through another device in the system. AC power to the LISN is to be filtered to eliminate ambient RF voltages. Install an appropriate filter on the public utility AC power source. Position the LISN 1.0 meter from the EUT or system containing the EUT *(see* Figures 6 and 7). Connect the EUT power cord to the appropriate port on the LISN. If the EUT has multiple power cords, each is to be connected through a separate LISN. Electrically bond the LISN enclosure(s) and AC power filter to the ground plane. Terminate unused RF ports on LISNs into 50 ohms.

If the EUT is not provided with a power cord, the unit is to be connected to the LISN by a power cord of the type specified by the manufacturer. This power cord is to be no longer than 2.0 meters. Excess power cord is to be bundled as described above. If a non-flexible power cord is provided with the EUT, it is to be cut to the length necessary to attach the EUT to the LISN.

Where the testing is performed at an on-site user installation, a line probe and RF noise meter may be used to make measurements of the line conducted EME of floor-standing equipment. A line probe and noise meter also are be used in situations where a LISN cannot be used because the EUT or support component requires high voltage or current. Line probe measurements are to be made between each current-carrying conductor on the equipment power supply lines and the ground conductor with a blocking capacitor (C) and a resistor (R), as shown on Figure 5, such that the total resistance between the line and ground is 1500 ohms. When using a line probe, special care must be exercised to establish a reference ground for the measurements. Do not use either an AC filter or a LISN with a line probe for measurements at a user installation.

Where a line probe is to be used, connect the EUT and its associated support equipment directly to the AC public utility power service and connect the line probe on the service cord of the EUT as described above. Note that measurements will be taken on each of the power supply lines of the EUT and its support components that connect directly to the public power service rather than another unit of the system. Thus the line probe will be moved, i.e. re-connected, to each of these lines in a serial manner as the testing progresses.

Step 4)

Allow the AC power cord from the EUT to drop vertically to the raised surface 25 centimeters above the floor and run horizontally across to the LISN. Arrange excess power cord in the same manner as excess interface cables as specified in Step 2 above. The bundle of excess power cord is to be located half-way between the EUT and the LISN. If the EUT is equipped with a permanently coiled power cord, this bundling is not required. Where a line probe is used, arrange the power cord of the device in this same manner.

Where on-site testing is performed, allow the power cords to remain in their normal installed positions to the extent possible consistent with attachment of the measurement equipment.

Step 5)

Peripheral or other equipment used to complete the EUT system is to be powered through a second LISN. This equipment is to be powered through a second LISN even where the EUT is provided with AC outlets for supplying power to peripheral devices. AC power for all LISNs is to be obtained from the same filtered source. Connect any peripheral and other equipment associated with the EUT to a second LISN. Additional LISNs may be used, as necessary, to supply power to other peripheral equipment, provided that the number of additional LISNs used is kept to a minimum. Terminate unused RF ports on the LISN(s) into 50 ohms.

If a line probe is used, connect peripheral and other equipment directly to the public utility AC power service.

Step 6)

Drape the AC power cords of peripherals and other support equipment onto the raised surface 25 centimeters above the ground plane, looping excess cord between the device and the LISN to which it is connected in the manner described in Step 2 above. No power cords from peripheral equipment are to be draped over the top of a LISN.

Where on-site testing is performed, allow the power cords of peripherals and other support equipment to remain in their normal installed positions to the extent possible consistent with attachment of the measurement equipment.

Where a line probe is used, arrange the power cords of peripherals and other support equipment in the same general manner.

Step 7)

Ground the EUT in accordance with the manufacturer's operating instructions. It the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground position of a three prong plug is to be connected to ground through the utility power service.

Step 8)

Connect the measuring instrument to a section of the LISN supplying power to the EUT using a suitable length of coaxial cable. The input to the measuring instrument will be transferred in the testing to LISN sections connected to the other current carrying conductors of the EUT to measure the line conducted emissions on those conductors. If a line probe is used, connect it between one of the current carrying conductors and the ground (*see* Figure 5). The line probe will be transferred in the testing to the other current carrying conductors of the EUT.

Step 9)

Record the arrangement of the equipment and interface cables. This is to include a diagram indicating the positions of the individual units of equipment, the distances between adjacent units and locations of interface cables. Photographs clearly showing the positions of the equipment and interface cables may be used in addition to a diagram.

Section 3.4.2 ***Testing for Conducted Emissions***

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Set the 6 dB bandwidth of the measuring instrument at not less than 9 kHz for conducted EME tests and the detector function of that unit to the quasi peak mode.

Step 3)

Calibrate the measuring instrument.

Step 4)

Measure the conducted EME of the EUT. Measurements are to be made by tuning the measuring instrument in a continuous manner over the range 0.45 MHz to 30 MHz. It is not necessary to move the positions of interface cables of floor-standing equipment to maximize emissions. Note that if the quasi-peak level of an emission as measured in the quasi-peak mode is 6 dB, or more, higher than the level of the same emission measured with the instrumentation detector function set to the average mode and the bandwidth at the same setting as the quasi-peak bandwidth, that emission is considered broadband. In such cases, a 13 dB reduction in the quasi-peak emission level may be used for comparison with the appropriate limit. Where high level emissions are observed, test engineers are advised to re-examine those emissions with the instrumentation in the the average mode and to employ the 13 dB reduction for broadband band emissions where the above conditions are met.

Each emission is to be maximized by varying the mode of operation, clock or data exchange speed and software programming, where applicable. Two modes of operation are to be examined for every EUT:

a) The EUT powered on and awaiting data input/output.

b) The EUT receiving/sending data in a typical operation.

If the EUT is a Class A device, record the three highest emissions levels in the frequency ranges 450 kHz to 1.705 MHz and the three highest emissions levels in the range 1.705 MHz to 30 MHz. If the EUT is a Class B device, record the 6 highest emissions levels in the range 450 kHz to 30 MHz. If either of the maximum emission levels, in the case of a Class A devices, or the maximum level, in the case of a Class B device, the exceed the FCC limit(s), the device must be redesigned before the equipment can comply with the FCC technical rules. The FCC line conducted emissions limits are:

Class A Devices -

On any frequency or frequencies within the band 450 kHz to 1.705 MHz, the line conducted voltage shall not exceed 1000 microvolts; on any frequency or frequencies within the band 1.705 MHz to 30 MHz, the line conducted voltage shall not exceed 3000 microvolts. The 1000 microvolt limit applies at 1.705 MHz.

Class B Devices -

On any frequency or frequencies within the band 450 kHz to 30 MHz, the line conducted voltage shall not exceed 250 microvolts

Note that measurements made with a line probe are dependent on the impedance presented by the AC utility power lines. The impedance of the AC supply mains may vary with time and location. Thus, when using a line probe, it may be necessary to perform repeated measurements over a suitable period of time to determine the variation in measured values. The time period should be sufficient to cover all significant variations in measured levels due to operating conditions at the installation. Such measurements are to be regarded as unique to the particular installation at which they are taken. As the line probe attenuates radio noise voltage, appropriate calibration factors must be added to the measured values.

Step 5)

Record the measurements in accordance with the data recording/reporting requirements specified in Section 3.6.

Step 6)

Transfer the input to the measuring instrument to the section of the LISN connected to the next current carrying conductor of the EUT to be measured. Alternatively, transfer the line probe to the next current carrying conductor of the EUT to be measured. Repeat Steps 2, 3, 4, and 5. Perform this step for each current carrying conductor of the EUT.

3.5 ***RADIATED EME MEASUREMENTS***

All radiated EME from the EUT, including those from system components and interconnecting cables, are to be measured.

3.5.1 *Preliminary Testing* - The instructions in Section 2.5.1 concerning preliminary testing for radiated emissions from table-top EUTs apply for floor-standing equipment.

3.5.2 ***Set - up***

Step 1)

Place the EUT on a suitable platform, surface, or raised floor, preferably a turntable, as specified in 3.2.5. If a turntable is used, the EUT is to be located in the center of the rotating surface. In the case of a multi-unit system, the individual components are to be balanced around the center of the rotating surface or positioned in a straight line with the center of the line coinciding with the center of the rotating surface, whichever is typical and appropriate for the EUT. Locate the platform, surface, or raised floor on a test site meeting the conditions for radiated tests specified in Section 2.1.1. It is recommended that a ground screen as specified in Section 2.1.4 be used in testing for radiated emissions. If the EUT is a system with table-top components, locate the table-top unit(s) on a table or tables as specified in Section 3.2.5. All floor-standing units and tables supporting table-top units are to be positioned on the same platform, surface, or raised floor. Position the equipment in an arrangement typical of normal use. (*See* Figures 6 and 7.)

Where on-site testing is performed, the EUT is to be tested in the configuration in which it is installed over its work surface. No alterations to the EUT or the floor upon which it is installed are to be made.

Step 2)

Prepare the equipment for operation, e.g. connect any component support units with cabling as specified in Section 3.3.2. Allow interface cables to drop vertically from component units to a raised surface 25 centimeters above the test platform or floor, run horizontally across this surface and vertically up to interfacing components. Interface cables longer than these distances are to be arranged in the space between the components in a serpentine fashion atop the raised surface using loops 30 to 40 centimeters long. Each interface cable is to be arranged individually. (*See* Figures 6 and 7.) Where it is impractical to arrange interface cables in the above manner because of bulk, stiffness or other reasons, the cables may be laid out in the center of a cable run in any convenient pattern.

Overhead cable trays and remote peripherals may be used as shown on Figure 8 where such equipment is typically used with the EUT in normal installations. Cable trays used in testing are to be typical of those used with the system. Route the interface cables up onto and down from the trays in an appropriate manner, looping any excess lengths of cable in the trays in the manner described above. Cables to remote peripherals are to run directly from the point where they exit the EUT enclosure to a point 1.5 meters behind the EUT and 1.0 meter above the ground plane. From this point, they are to drop verticlaly to the raised surface 25 centimeters above the floor of the test facility, either in the center of the turntable or directly above the EUT. Remote peripherals are to be located at a distance from the EUT that is typical of normal use.

Where on-site testing is performed on-site, do not move equipment or otherwise alter the arrangement and configuration of the equipment specifically for the testing.

Step 3)

Connect the power cords of the EUT and its support units to the public utility AC power outlet on the surface of the turntable or platform on which the equipment is positioned. The EUT power cord is to be connected directly to an AC outlet on the test table for these measurements even if the EUT would typically receive power through another device in the system. Allow the AC power cord from the unit(s) to drop vertically to the raised surface 25 centimeters above the floor and run straight to the power outlet(s). Arrange excess power cord in the same manner as excess interface cables as specified in Step 2 above. The bundle of excess power cord is to be located half-way between the unit and the AC outlet. If the EUT is equipped with a permanently coiled power cord, this bundling is not required.

If the EUT is provided with one or more AC outlets that can be used to power a peripheral, the radiated EME tests are to be made with the power cords of the appropriate the peripheral(s) connected to the AC outlet(s) on the EUT.

If a unit of equipment is supplied without a power cord, connect the unit to an AC outlet by a power cord of the type specified by the manufacturer and of a length not longer than 2.0 meters. If a non-flexible power cord is provided with a device, cut it to the length necessary to attach the equipment to the AC outlet and then connect the unit to the AC outlet.

Where on-site testing is performed, allow the power cords to remain in their normal installed positions.

Step 4)

Ground the EUT in accordance with the manufacturer's operating instructions. It the EUT normally is operated without a ground connection, it is to be tested ungrounded. Where the EUT is furnished with a grounding terminal or an internally-grounded lead that is to be connected to an external ground in normal installation conditions, the ground or lead is to be connected to the ground plane (or other facility for earth ground). Any internally-grounded lead included in the AC power cord of the device and terminating in the ground position of a three prong plug is to be connected to ground through the utility power service.

Step 5)

Determine the appropriate frequency range over which to measure the EME of the EUT from the following:

EUT Highest Internally Generated Frequency	Frequency Range of Measurements
1.705 - 108 MHz	30 - 1000 MHz
108 - 500 MHz	30 - 2000 MHz
500 - 1000 MHz	30 - 5000 MHz

Step 6)

Set up the measuring receiver and the antenna for measuring emissions in the range 30 to 1000 MHz, with connection of the antenna to the receiver through an appropriate length of coaxial cable. If the EUT can be rotated, locate the antenna at the distance from the EUT for a Class A or Class B digital device as appropriate. If the EUT cannot be rotated, measurements are to be made by moving the antenna around the EUT or system. Locate the antenna at a convenient radial for the first measurement at the distance from the EUT or system for a Class A or Class B digital device as appropriate.

The distance between the EUT and the antenna is measured as the horizontal distance from: 1) the nearest point on the antenna to the EUT when the antenna is oriented to receive emissions from that device; to 2) the point on the EUT nearest the antenna over a complete rotation or circuit. For an EUT 0.5 x 1.5 meters in depth and width, the nearest point of the device to the test antenna will be a corner (the corners of the EUT are approximately 0.56 meters from the center of the unit).

For Class A digital devices, the distance between the antenna and the EUT is to be 30 meters. For Class B digital devices, the distance is to be 3 meters. If it is impractical to measure at these distances because of size, location, etc., measurements may be made at other distances, provided that the EUT is substantially in the far field.

Step 7)

Record the arrangement of the equipment and interface cables. This is to include a diagram indicating the positions of the individual units of equipment, the distances between adjacent units and locations of interface cables. Photographs clearly showing the positions of the equipment may be used in addition to a diagram.

3.5.3 ***Testing for Radiated Emissions***

Step 1)

Turn on the EUT and allow a sufficient period of time for the unit to warm up to its normal operating condition.

Step 2)

Prepare to measure emissions in the frequency range 30 - 1000 MHz by setting the 6 dB bandwidth of the measuring instrument to at least 100 kHz and the detector function of that unit to the quasi-peak mode.

Step 3)

Calibrate the test instrument.

Step 4)

Measure emissions in the range 30 - 1000 MHz. Search for emissions by tuning the instrument in a continuous manner over this range. Each emission is to be maximized while operating the EUT in accordance with the instructions in Step 4 of Section 2.4.2. Where the EUT or system is positioned on a turntable, maximize each emission individually by rotating the test table though 360 degrees, raising and lowering the antenna from 1 to 4 meters, and orienting the antenna in both the horizontal and vertical positions to find the maximum level. Where the EUT or system is positioned on a non-rotating surface or is being tested on-site, maximize each emission individually by moving the antenna around the equipment at 20 degree intervals and at each radial raising and lowering the antenna from 1 to 4 meters and orienting the antenna in both the horizontal and vertical planes to find the maximum level. At each radial, take care to place the antenna so that it is located the proper distance from the EUT as specified in Step 6 of Section 3.5.2 above. It is not necessary to move the positions of interface cables of floor-standing equipment to maximize emissions.

Each emission is to be maximized individually by varying the mode of operation, clock or data exchange speed and software programming, where applicable. Two modes of operation are to be examined for every EUT:

a) The EUT powered on and awaiting data input/output.

b) The EUT receiving/sending data in a typical operation.

Record the maximum emissions levels observed with the antenna in the horizontal and vertical positions in each frequency range specified in the FCC limits, e.g. 30 - 88 MHz, 88 - 216 MHz, 216 - 960 MHz and above 960 MHz. If any of these maximum levels exceed the FCC limits, the device must be redesigned before the equipment application may be filed. Record the positions of the turntable or the antenna radials associated with the individual maximum EME measurements. Where the antenna is moved, care must be taken to carefully record the position of the first radial in relation to the EUT or system. The FCC digital device radiated emissions limits are:

Class A Devices - The field strength at a distance of 30 meters shall not exceed:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	30
88 - 216	50
216 - 960	70
Above 960	100

Class B Devices - The field strength as a distance of 3 meters shall not exceed:

Frequency of Emission (MHz)	Field Strength (microvolts/meter)
30 - 88	100
88 - 216	150
216 - 960	200
Above 960	500

The tighter limits apply at the band edges.

If the highest operating frequency of the EUT is less than or equal to 108 MHz, proceed to Step 7.

Step 5)

Prepare to measure emissions above 1000 MHz. Connect the antenna for measuring emissions above 1000 MHz to the measuring receiver and set it up at the proper distance from the EUT as specified Step 6 of Section 3.5.2. Set the 6 dB bandwidth of the measuring receiver to at least 1 MHz and the detector function of that unit to the peak mode.

Step 6)

Measure emissions above 1000 MHz up to the maximum measurement frequency for the EUT, as determined in Step 5 of Section 3.5.2 above, using the measurement scheme described in Step 4 above. Record the maximum emission levels observed with the antenna in the horizontal and vertical positions for the frequency ranges 1000 - 2000 MHz and 2000 - 5000 MHz, up to the highest frequency examined. Photograph the test set-up and inter-

face cable arrangement for the highest level of emissions observed in each of the frequency intervals examined. If any of these maximum levels exceed the FCC limits, the device must be redesigned before it can comply with the FCC technical rules.

Step 7)

Record the measurements in accordance with the data recording/reporting requirements specified in Section 3.6.

3.6 DATA REPORTING/RECORDING REQUIREMENTS

3.6.1 *Test Report* - The test report for floor-standing equipment is to contain the following information:

1) The location of the test sites used for the line conducted and radiated measurements and whether these sites were laboratory facilities or on-site locations

2) Identification and description of the instrumentation and equipment used to perform the test. This is to include identification of the type of antenna(s) used for measuring radiated emissions.

3) Specific identification, including the FCC ID's if applicable, of the EUT and, in the case of multi-component systems, all equipment used in the system with the EUT.

4) Descriptions of the length and construction of each interface cable. The report is to indicate whether cables are shielded or unshielded, have plastic or metallic hoods, have ferrite beading, etc.

5) The diagrams and any photographs prepared in the test set-up activity showing the arrangement of the equipment in the line conducted and radiated EME tests.

6) A description of any alternative methods used in the testing, in accordance with the specifications in Section 3.6.4.

7) The test results and associated comparative information presented in accordance with the specifications in Sections 3.6.2 and 3.6.3.

8) A description of any modifications made to the EUT or other system components during the testing.

9) The party who performed the tests.

10) The location where the tests were performed.

11) The date the tests were performed.

12) A statement signed by the individual responsible for the test that the EUT as tested complies or does not comply with the applicable FCC rules.

13) Where the EUT is found to comply with the applicable FCC rules, a statement signed by the individual responsible, either directly or indirectly, for production or marketing of the device that the unit tested is representative of the equipment that will be marketed.

Note : In the case of devices required to be certificated, refer also to Part 2 and Part 15 of the FCC rules for general information requirements pertaining to all applications for certification.

3.6.2 *Recorded Measurements* - The 6 highest emissions observed on each conductor of the EUT power cord in the line conducted emissions test and the highest emissions measured with the antenna(s) in the horizontal and vertical planes in each of the frequency ranges examined in the radiated emissions test are to be recorded in the test report. In addition, the report is to include the diagrams of the interface cable positions and, for radiated emissions, the table and antenna positions associated with those emissions. These diagrams are to be in in sufficient detail to allow repeatability of the test results to within +/- 2 dB. In cases where the antenna was moved in the radiated EME testing, the position of the first test radial in relation to the EUT or system is to be specifically indicated. Also include the photographs of the EUT and interface cables for the individual maximum measured emissions in the line conducted and radiated EME tests. If taken, photographs of the test set-up for all of the reported measurements may be included. The measurement results and the FCC limits for Class A or Class B digital devices, as appropriate, are to be presented in tabular form for comparison purposes. If a graphic presentation of the data is available, i.e. a plot from a spectrum analyzer, it should be incorporated into the test report also.

3.6.3 *Units of Measurement* - The specifications for recording units of measurement for table-top EUTs in Section 2.6.3 apply for floor-standing equipment.

3.6.4 *Description of Alternate Methods and Conditions Used* - The instructions for recording of descriptions of alternate methods and conditions used in testing of table-top EUTs in Section 2.6.4 apply for floor-standing equipment.

REFERENCES

This standard includes the following publications to the extent they are applicable:

(1) American National Standard Specifications for Electromagnetic Interference and Field Strength Instrumentation 10 kHz to 40 GHz, ANSI C63.2 (1987)

(2) American National Standard Methods of Measurement of Electromagnetic Emissions from Low Voltage Electrical and Electronic Equipment in the Range of 10 kHz to 1 GHz, ANSI C63.4 (1981)

(3) Part 15 of the FCC Rules and Regulations, 47 CFR part 15

(4) FCC/OET Bulletin 62, "Understanding FCC Rules for Digital Devices" *

(5) FCC/OET Bulletin 55, "Characteristics of Open Field Test Sites" *

* These bulletins are available from the FCC Consumer Assistance and Small Business Division, 1919 M Street., N.W., Washington, D.C. 20554

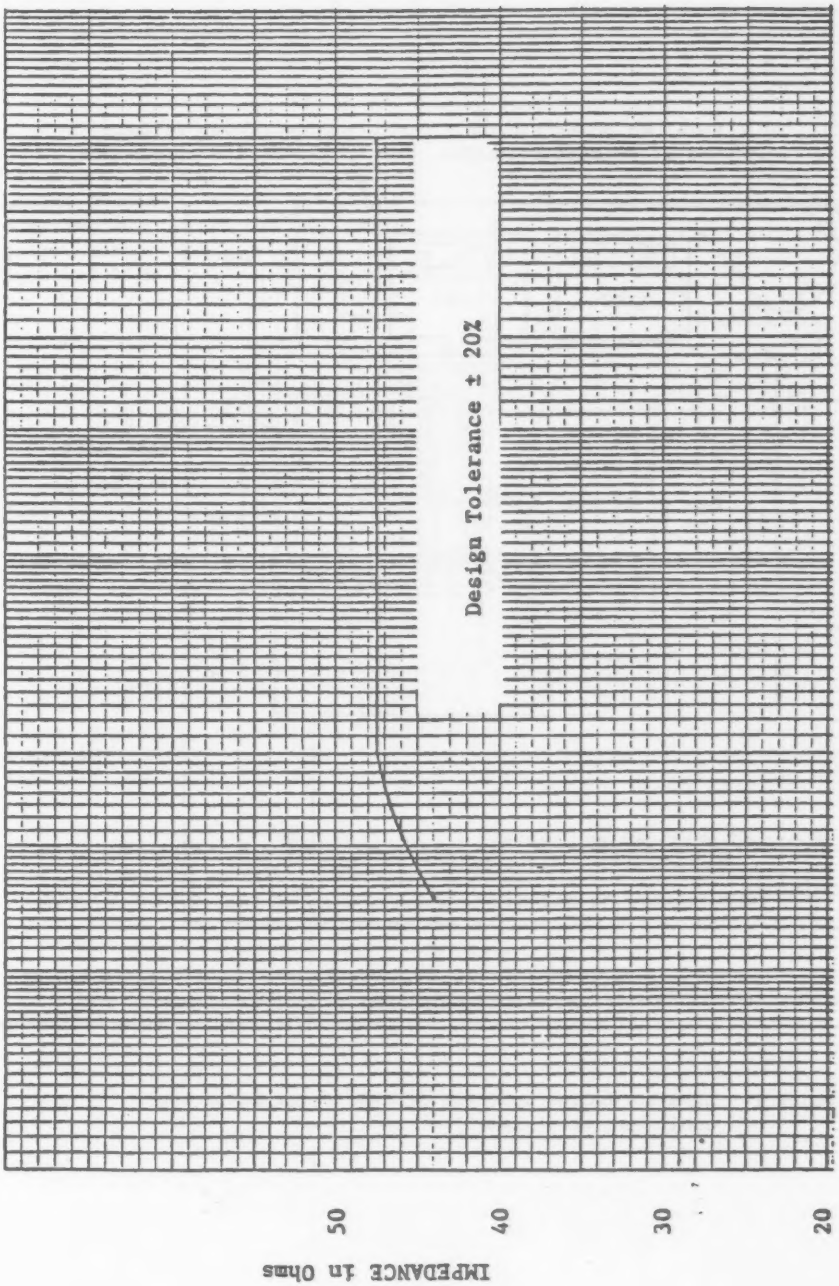


Figure 1 - Impedance vs Frequency Characteristic of desired Line Impedance Stabilization Network in the frequency range 0.45 to 30 MHz.

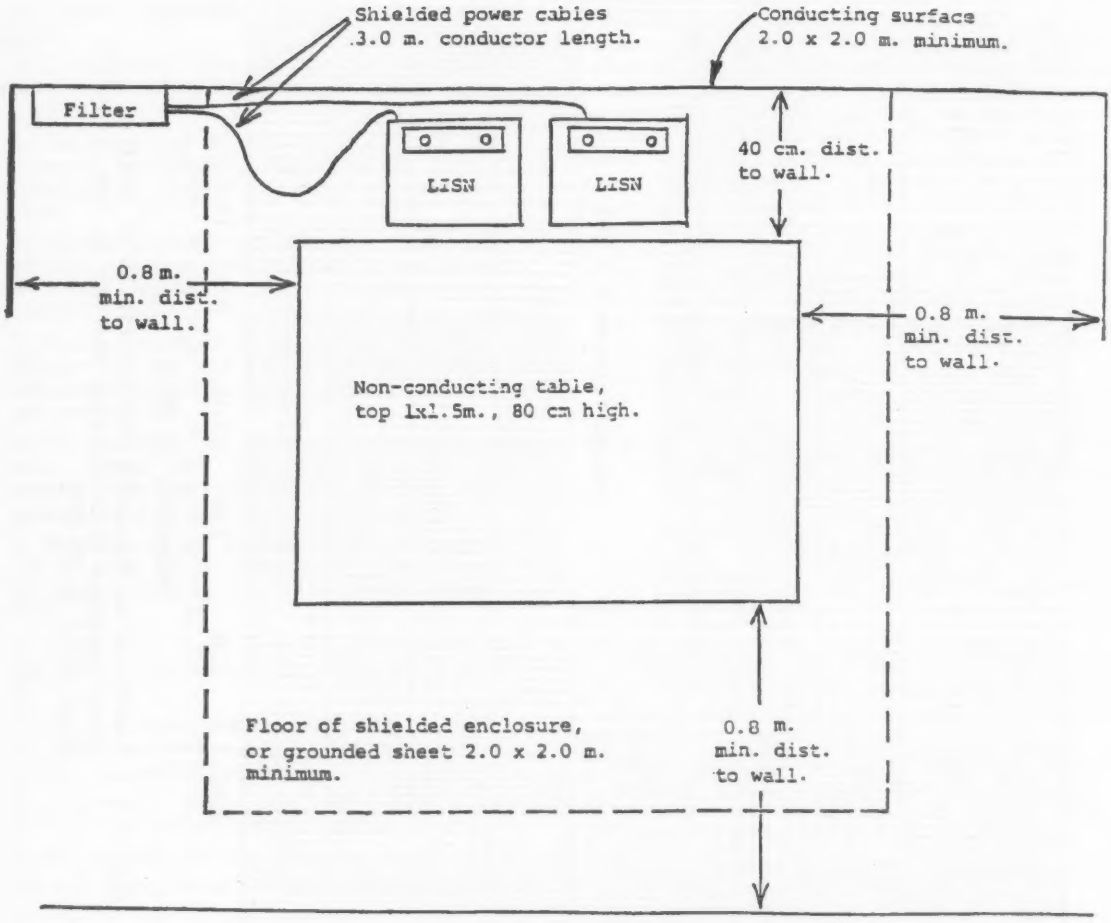


Figure 2 - Line conducted test configuration for table-top equipment (top view).

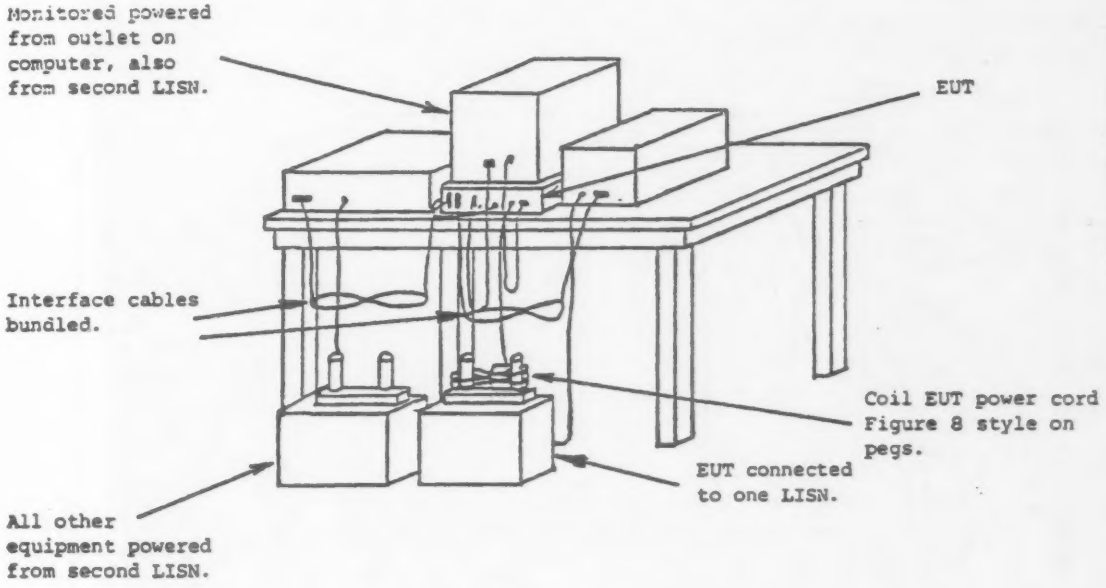

Monitored powered from outlet on computer, also from second LISN.
EUT
Interface cables bundled.
Coil EUT power cord Figure 8 style on pegs.
EUT connected to one LISN.
All other equipment powered from second LISN.

Figure 3- Line conducted testing of table-top equipment.

NOTE: Conducting walls omitted to show cable positioning. Refer to Figure 2

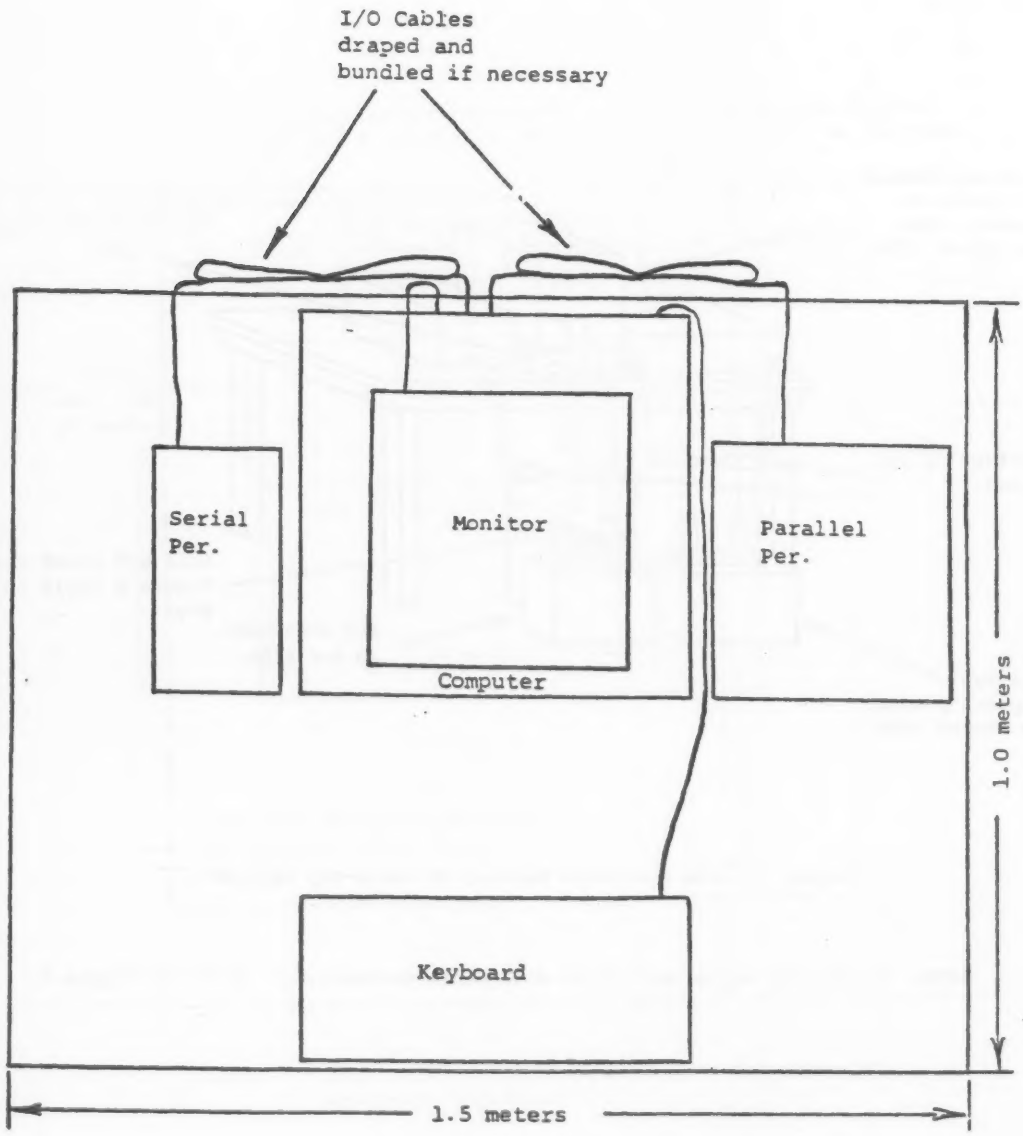


Figure 4 - Test platform for testing table-top equipment (top view).

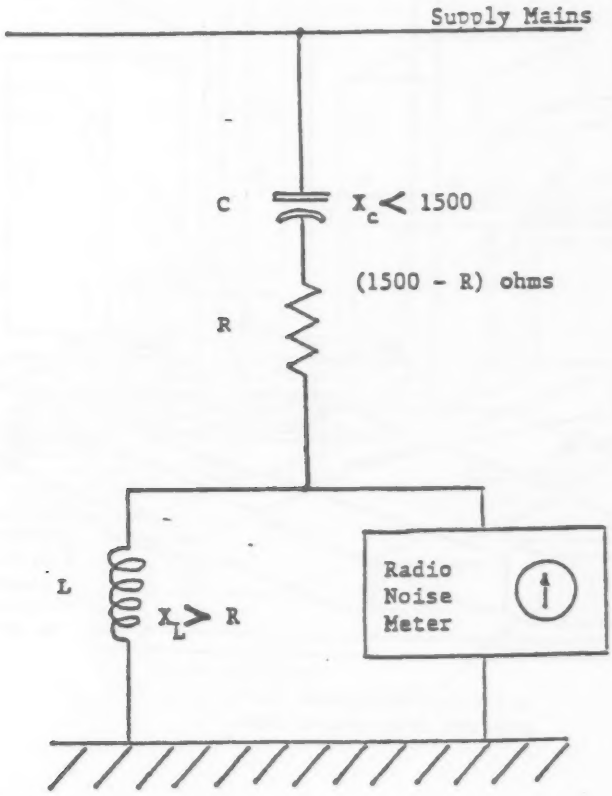


Figure 5 - Line probe for line conducted EME measurements.

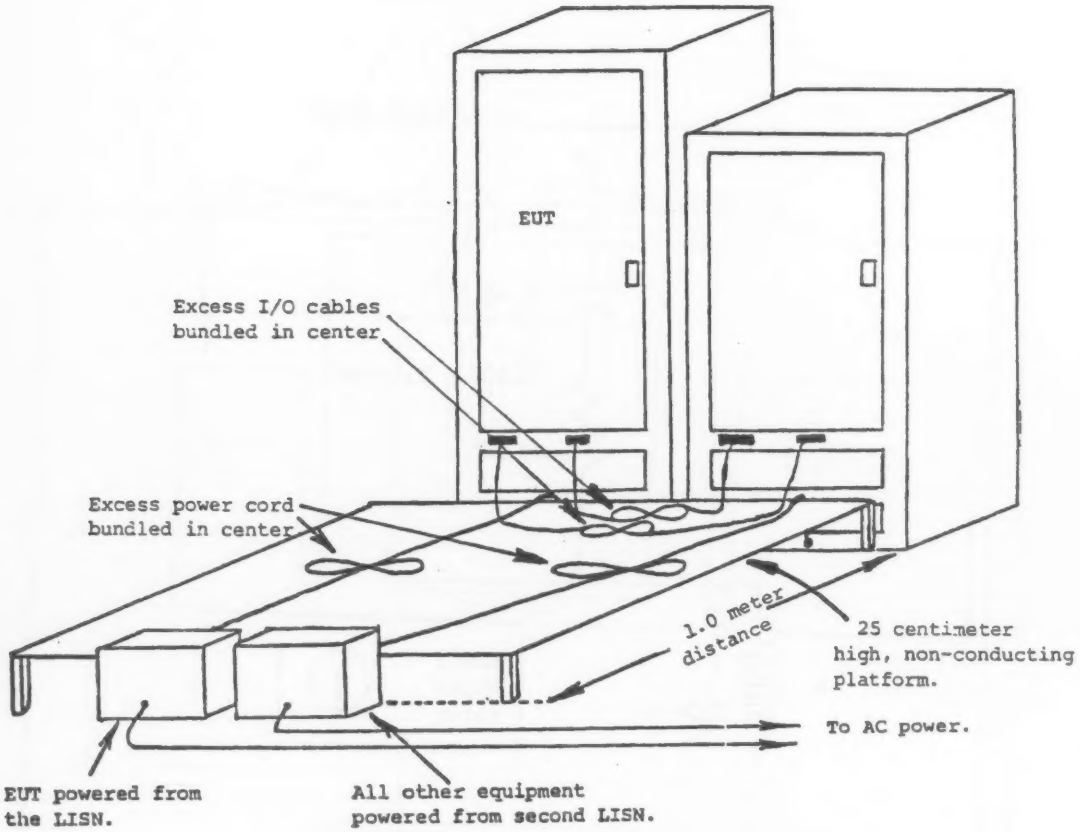

EUT
Excess I/O cables bundled in center
Excess power cord bundled in center
1.0 meter distance
25 centimeter high, non-conducting platform.
To AC power.
EUT powered from the LISN.
All other equipment powered from second LISN.

Figure 6 - Test configuration for floor-standing equipment.

Note: Conducting wall not required for line conducted testing of floor-standing digital devices. The EUT is not to be powered through a LISN for radiated EME measurements.

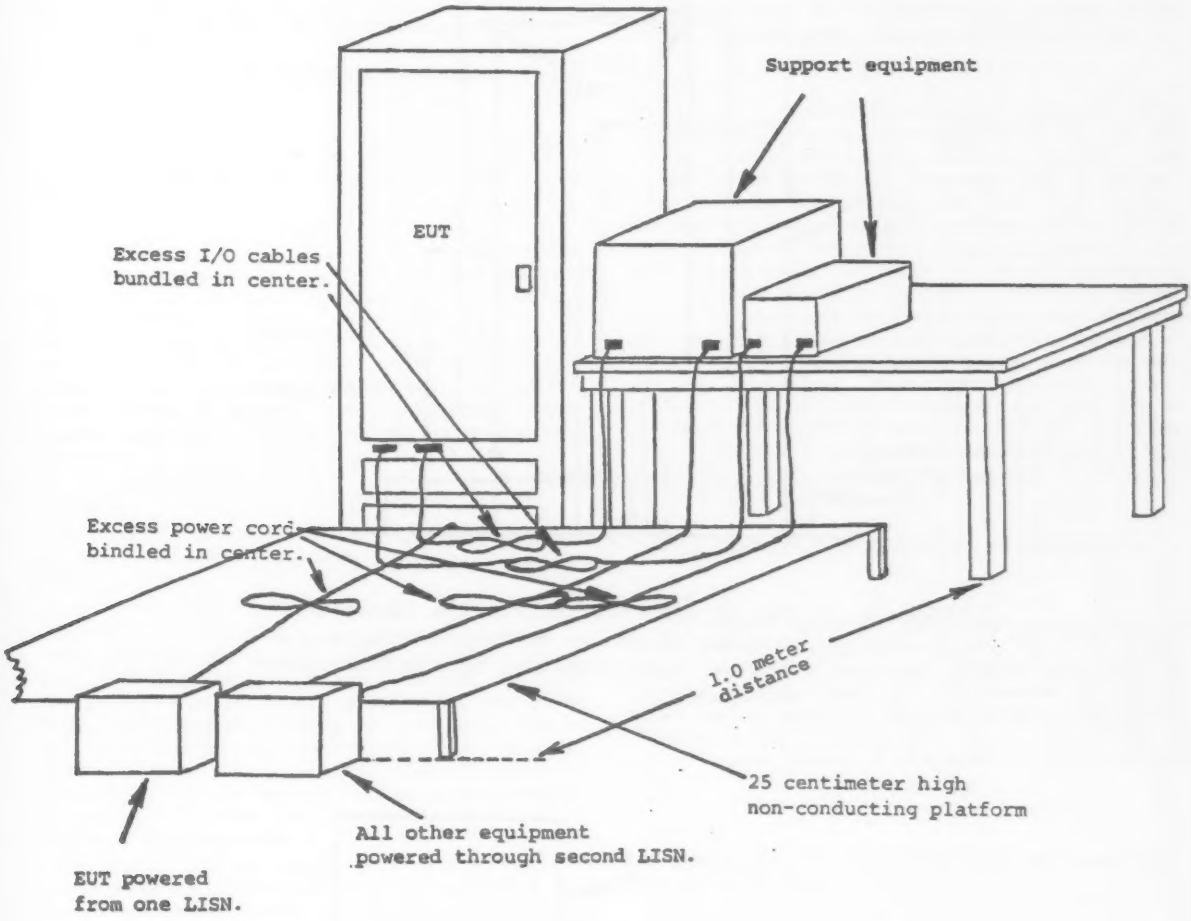

Support equipment
EUT
Excess I/O cables bundled in center.
Excess power cord bindled in center.
1.0 meter distance
25 centimeter high non-conducting platform
All other equipment powered through second LISN.
EUT powered from one LISN.

Figure 7 - Test configuration of floor-standing and table-top equipment combinations.

Note: Conducting wall not required for line conducted testing of floor-standing digital devices. The EUT is not to be powered through a LISN for radiated EME measurements.

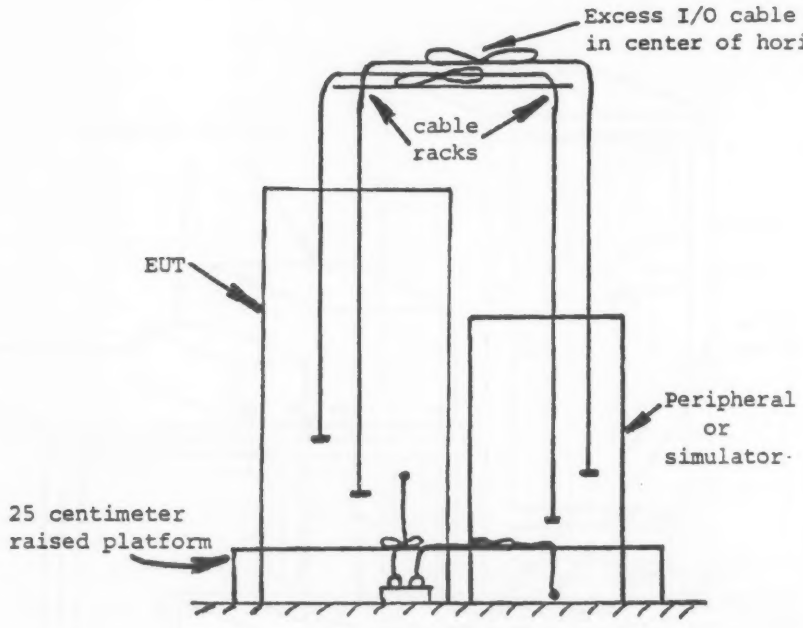
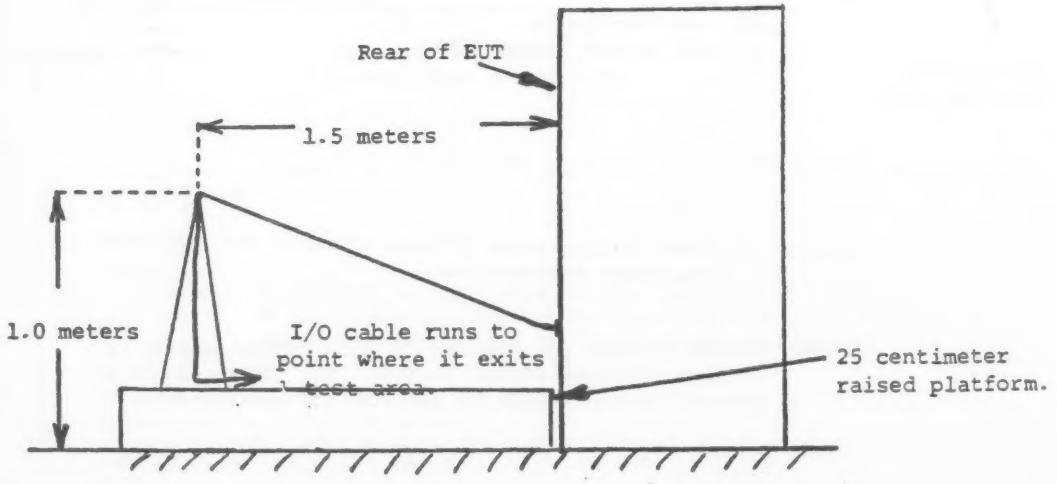


Figure 8 - Use of overhead cable trays (above) and routing of cables to remote peripherals (below) during testing of floor-standing equipment.



APPENDIX

PROCEDURE FOR CHECKING LINE IMPEDANCE STABILIZATION NETWORKS

The impedance and attenuation of each Line Impedance Stabilization Network (LISN) section is to be measured at least once a year using the following procedures:

A.1 *MEASURING THE IMPEDANCE OF A LISN*

Step 1)

This measurement is to be made with the LISN installed for measuring the line conducted EME of any device.

Step 2)

To avoid possible introduction of AC power from the supply line into the measuring instrument, disconnect the power connections (both neutral and hot lines) to the test set-up at the line side of the RF filter. Note: Since the RF filter will isolate the LISN from power line impedance effects that can cause the apparent impedance of the LISN to vary beyond the acceptable limits, the RF filter should remain connected to the LISN during impedance measurements.

Step 3)

Connect a 50 ohm termination to every coaxial port on the LISN provided for connection of a measuring instrument.

Step 4)

The preferred instrument for measuring LISN impedance is a vector impedance meter that can be tuned continuously over the frequency range 450 kHz to 30 MHz. Other impedance measuring instruments may be used as long as they are continuously tunable over the required frequency range. If other types of impedance measuring instruments are used, it is acceptable to modify the procdeure described herein as appropriate to suit the measuring instrument used.

Instruments that are capable only of measuring the impedance at a selected frequency (i.e. an instrument that is not continuously tunable) are not acceptable for these measurements since they do not facilitate detection of resonances at all frequencies over the specified range.

Using an adapter with short connections such as that shown in Photo 1, connect the measuring instrument directly to one terminal of the AC outlet on the load side of the LISN normally used to supply power to the EUT or peripheral, and measure the impedance of that side of the LISN, tuning the instrument over the frequency range between 450 kHz and 30 MHz so as to detect any impedance variations that may be due to resonances or other imperfections.

Step 5)

Plot the measured impedance curve for comparison with the tolerances shown in Figure 1 of this test procedure. If any measured value exceeds the permissible error tolerance, the LISN must be modified to reduce the error to an acceptable level.

Step 6)

Repeat steps 4 and 5 with the measuring instrument connected to the other terminal of the AC outlet on the LISN used to supply power to the EUT or peripheral.

Step 7)

If the LISN has three current carrying terminals on the AC outlet, repeat steps 4 and 5 for the third terminal.

Step 8)

If the LISN inductors have magnetic materials in their construction, make the following additional tests with AC current applied through the LISN to ensure that any variability due to effects of line current can be detected. Disconnect the RF filter from the LISN. Short together the load terminals of the LISN and feed current into the supply terminals from a low voltage transformer of suitable current rating (*See* Figure A). An AC ammeter in series with the circuit can be used to measure the applied current and a variable transformer can be used to regulate the amount of current by varying the primary voltage of the transformer. The high current circuit should not have a ground connection. Connect the measurement instrument as shown in Figure A. Measure the impedance of the LISN while supplying current at the LISNs maximum current rating. The impedance values measured by this technique will be approximately one-half of those observed in steps 5, 6, and 7.

A.2 *MEASURING THE ISOLATION BETWEEN LISNs*

Step 1)

The isolation between the AC supply ports of the EUT LISN and the corresponding ports of the other LISNs used in the line conducted measurements must be checked to ensure that the EME entering the second LISN does not affect the measured levels of EME at the EUT LISN. Begin this procedure by performing steps 1, 2, and 3 of the impedance measurement procedure in A.1 above.

Step 2)

Leave the RF filter disconnected from AC power at the line side of the filter.

Step 3)

Connect a signal generator to one terminal of the LISN port used to supply current to the EUT using an adaptor similar to that shown in Photo 1.

Step 4)

Using the same type of adapter, connect the measuring equipment to the corresponding AC supply port on the second LISN.

Step 5)

Measure the signal levels at the second LISN over the range 450 kHz to 30 MHz. The signal levels so measured at the second LISN should be at least 40 dB below the signal levels supplied to the EUT LISN.

Step 6)

Repeat Steps 4 and 5 for the corresponding AC supply ports on all LISNs used in line conducted measurements at the test facility.

Step 7)

Repeat Steps 3, 4, 5 and 6 for all current carrying terminals on the A/C outlet of the EUT LISN.

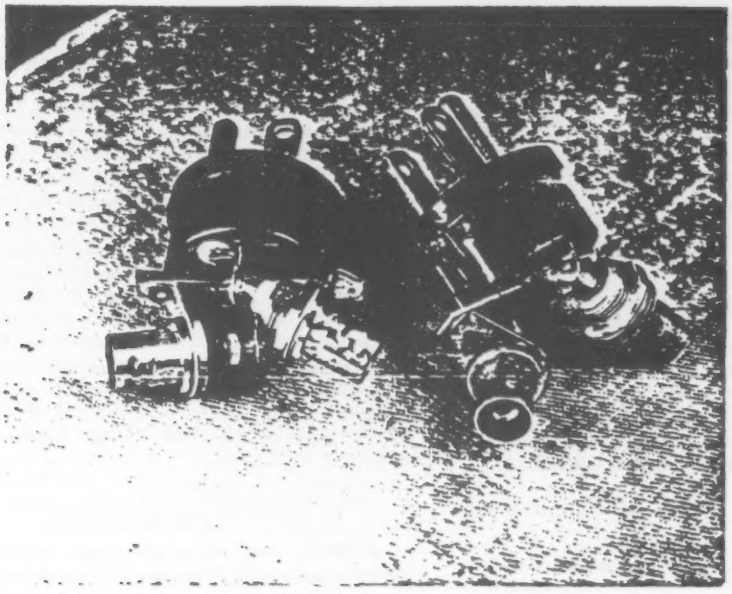
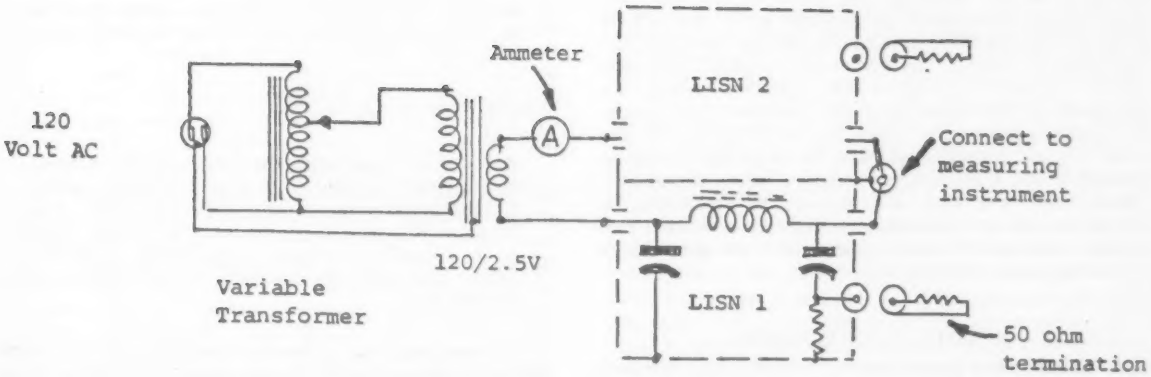


Photo 1



51

Figure A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMTEL CORPORATION,
Complainant,

v. File No. E-87-38

THE MOUNTAIN STATES
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1989; Released: March 8, 1989

By the Commission:

1. Amtel Corporation has filed an Application for Review[1] of a Memorandum Opinion and Order (Order) of the Chief, Common Carrier Bureau[2] granting a Motion to Dismiss filed by the defendant in the above-captioned matter. For the reasons set forth below, we deny Amtel's application.

I. BACKGROUND

2. In its complaint, Amtel alleged that Mountain States had improperly interpreted its Tariff F.C.C. No. 1 relating to the calculation of access charges for interstate usage. Because the end office serving Amtel in Brigham City, Utah lacked equipment to measure actual minutes of usage, Mountain States applied the flat-rate surrogate provided for in its tariff. The sole thrust of Amtel's argument in its complaint was that it was improper to apply the surrogate in this situation if the customer's own equipment had measurement capability. In its Order, the Bureau rejected Amtel's argument. In so doing, it cited as precedent the Commission's *Access Charges* decisions. [3] These cases held, *inter alia*, that it was reasonable for exchange carriers to bill access charges on a flat-rate basis if their equipment in a serving end office was incapable of providing actual measurement.

II. AMTEL'S CONTENTIONS

3. Amtel asserts three reasons to reverse the Bureau's Order. It first claims that the Chief of the Common Carrier Bureau exceeded his delegated authority by acting on the issues presented by the complaint. In this regard, Amtel contends that the Bureau Chief is not permitted to act pursuant to delegated authority on matters which present novel questions which cannot be resolved under outstanding Commission precedent. *See* 47 C.F.R. § 0.291. It claims that its complaint did present such a novel question; *i.e.*, there was no Commission precedent addressing the issue of whether measurement capability is the sole province of the exchange carrier.

4. Amtel's second allegation is that the Bureau Chief erred by not convening an evidentiary hearing before an administrative law judge prior to acting on the complaint. In support of this assertion, Amtel cites to the statement contained in paragraph 5 of the Order, "It is clear that no evidence has been presented in this proceeding to call this Commission precedent into question." It claims that the Bureau erred because it was not afforded the opportunity to present such evidence in a hearing before an administrative law judge.

5. Finally, Amtel alleges that the Bureau Chief erred by misapplying or misinterpreting the Commission's policy on the use of assumed minutes for end offices with no measurement capability. It claims, without citation to fact or authority, that this policy was based upon a concern that exchange carriers be appropriately compensated for the use of their facilities in congested end offices but this policy did not cover the small end offices at issue here where there simply is not enough traffic to approach the assumed usage level.

III. DISCUSSION

6. With respect to the allegations that the Bureau Chief did not act within the scope of his delegated authority, we find nothing in the application for review or in the underlying Bureau Order that the matter in controversy presented a new or novel question. The Commission has exhaustively considered and reviewed the circumstances of applying assumed minutes of usage where the exchange carrier lacked measurement capability in the serving end office.[4] For example, in the *Second Reconsideration* Order at 854, we stated:

> The use of a per line charge might arguably disadvantage new entrants that will not immediately achieve usage levels that approach the relevant minutes per line factor . . . . Any minimal disadvantage that new entrants might experience is outweighed by the administrative costs that carriers would be likely to incur.

Furthermore, we said at 855:

> But we have permitted exchange carriers without measurement capability in *their* [emphasis added] end-offices to bill . . . on a flat-rate basis. This situation will not change on January 1, 1986 -- that is in end-offices without measurement capability [access charges] may continue to be billed on a flat-rate basis.

7. Everything that the Bureau Chief found in the Order below is consistent with this precedent. The Bureau Chief properly addressed and correctly resolved the issues raised by Amtel in its complaint and we find this assertion of Amtel in its application to be without merit.

8. Secondly, we find no error on the part of the Bureau Chief in not convening an evidentiary hearing before an administrative law judge. Despite Amtel's assertion in its application for review, the questions presented by Amtel's complaint were legal ones, not factual ones.[5] We note that the matters in controversy were decided in the context of a motion to dismiss. Assuming, *arguendo*, that the matter went to hearing, a proceeding before an administrative

law judge would still not be required by law because there were no contested facts. It is well established that when the decisionally significant facts in a complaint proceeding pursuant to Section 208 of the Act are undisputed and only the legal conclusions derived therefrom are contraverted, we have ample discretion to resolve these matters upon the basis of the evidence of record without resorting to time-consuming and costly evidentiary proceedings before an administrative law judge. *See, e.g., Comark Cable Fund III v. Northwestern Indiana Telephone Co., Inc.*, 104 FCC 2d 451, 460 (1985), *remanded on other grounds*, 824 F.2d 1205 (D.C. Cir. 1987), *on remand* 3 FCC Rcd 3096 (1988), *appeal docketed sub nom. Northwestern Indiana Tel. Co. v. FCC*, D.C. Cir. No. 88-1521 (July 22, 1988).

9. Section 208 provides, in pertinent part, that the Commission may investigate the matters complained of "in such manner and by such means as it shall deem proper." *See Bunker - Ramo v. Western Union*, 25 FCC 2d 691 (1970). Since Section 208 of the Act does not mandate any particular form of proceeding, the Commission, as well as the Bureau Chief under delegated authority, in the absence of a dispute over a material question of fact involving the credibility of witnesses, has discretion to undertake enforcement action by means other than a costly and prolonged evidentiary hearing before an administrative law judge. This is specifically contemplated and authorized by Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, which permits alternative types of hearings in the absence of a statute requiring a hearing before an administrative law judge. *See ITT World Communications v. FCC*, 595 F.2d 897, 900-01 (2d Cir. 1979); 2 K. Davis, Administrative Law Treatise, ¶ 12.10 at 447 (2d Ed. 1979).

10. It was appropriate for the Bureau Chief to have acted on a motion to dismiss in this proceeding. It is clear that the parties had ample opportunity to submit written pleadings, as well as evidence, and to extensively brief the legal issues raised. Amtel has not identified a single fact in its application that was in controversy and which could have led to a finding in its favor. Indeed, the conclusions of law were based on the undisputed facts alleged by Amtel itself. Thus, the action taken by the Bureau Chief on the basis of the existing record was consistent with the requirements of the Administrative Procedure Act and within the scope of his delegated authority.

11. Finally, we disagree with Amtel's argument that the previously cited Commission precedent regarding the use of a flat-rate surrogate where the end office lacks measurement capability is inapplicable to the small end offices Amtel uses. On the contrary, the flat-rate surrogate was intended to be an estimate of average usage in end offices without measurement capability. As such, actual usage can be expected to be lower than the surrogate in some end offices and higher than the surrogate in others. We would, of course, prefer to have local exchange carriers (LECs) compute access charges on the basis of actual minutes. This will be possible as the LECs replace older equipment with newer equipment having measuring capability. Until then, however, we have struck a balance which we believe is fair to both the customer and the LEC of using the surrogate flat-rate for offices which lack measurement capability.

12. Furthermore, it is clear that Amtel is endeavoring to use this proceeding to mount a collateral attack on the Commission's well-established policy of permitting an exchange carrier to use a surrogate rate when it does not have measurement capability in a serving end office.[6] As cited above, we have found on numerous occasions that the surrogate rate is a fair and appropriate means of addressing the technological limitations of certain end offices. Hence, we find its assertions to be without merit.

13. In sum, the Order of the Bureau Chief was consistent with our long established and well articulated policy on this subject. It merely reaffirmed that policy and found that Mountain States' actions were consistent with its tariff which is in conformance with that policy. Moreover, Amtel was accorded due process in compliance with the Administrative Procedure Act. Therefore, we find no merit in Amtel's application for review and it is denied.

14. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 1.115, that the Application for Review filed by Amtel in this matter IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Mountain States filed an Opposition on July 29, 1988, and Amtel replied on August 9, 1988.

[2] Amtel v. Mountain States Telephone and Telegraph Company, 3 FCC Rcd 3719 (1988).

[3] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), *modified on reconsideration*, 97 FCC 2d 682 (1983) (*First Reconsideration*), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (*Second Reconsideration*), *aff'd and remanded in part sub nom.* NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984) (*Third Reconsideration*), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 101 FCC 2d 1222 (1985) and 50 Fed. Reg. 18249 (1985) (*Fourth Reconsideration*), *aff'd on further reconsideration*, 50 Fed. Reg. 43707 (1985) (*Fifth Reconsideration*), *appeal docketed sub nom. U.S. Telephone, Inc. v. FCC*, No. 84-1115 (D.C. Cir. March 23, 1985), *appeal dismissed, (D.C. Cir. Mar. 12, 1985)*.

[4] *See* note 3, *supra*.

[5] Furthermore, Amtel contradicts itself on this point by stating at page 9 of its application that "this action involves a question of law and policy.

[6] Although we have never explicitly addressed use of the surrogate in situations where a customer has its own measurement capability, when we first adopted the use of the surrogate, we had information before us indicating that customers might in fact possess their own measurement capability. *See* 101 FCC 2d at 1232. Faced with the option of considering the use of such customer-supplied usage data, we nevertheless chose to rely solely on the assumed minutes surrogate. Amtel has presented us with no persuasive reasons to revisit or waive this decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Corporation Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1702

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1989; Released: March 8, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the Contel Corporation (Contel), on behalf of its operating telephone companies,[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Contel filed a cost allocation manual on August 31, 1987. That manual described Contel's nonregulated activities, listed the activities Contel proposed to treat as incidental activities, and provided information on Contel's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *Contel Order* [3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved Contel's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that Contel submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[4]

3. Contel submitted its revisions, which provide additional information regarding the problem areas identified in the *Contel Order*, on October 3, 1988. According to Contel, these revisions comply fully with that Order.[5] No party commented on these revisions.

4. After reviewing the contents of Contel's revised manual, we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *Contel Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas in which Contel has complied fully with Commission requirements and the *Contel Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve Contel's October 3, 1988 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than April 30, 1989.[6]

II. DISCUSSION

A. Overall Sufficiency of the Manual

5. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *Contel Order*, we required Contel to provide additional, and in certain instances, corrected information regarding each of these areas. In its revised manual, Contel provides extensive additional information regarding these areas.

B. Affiliate Transactions

6. In the *Contel Order*, we stated that is impossible to determine if Contel is following the Commission's affiliate transactions rules because Contel does not discuss the terms and frequency of these transactions.[7] In its revised manual, Contel addresses the nature, terms and frequency of transactions between Contel telephone operating companies and affiliated companies. However, it introduces new terms into its manual which do not meet the Commission's criteria for determining the terms of affiliate transactions. The manual uses the term "market rate" defined as "where the price represents a current market quotation if the service or product is offered under general market conditions between buyers and sellers in arm's length negotiations."[8] For transactions involving the provision of a service, this definition is inconsistent with the criteria described in the *U S West Order* [9] because it would allow a single transaction or offer, with a nonaffiliate, to establish a market price.[10] In addition, in the *NYNEX Compliance Order*,[11] we determined that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[12] We held that the only general exception to this costing methodology "permits the carrier to record an affiliate's services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[13] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[14] Finally, untariffed services that carriers provide to nonregulated affiliates must also be recorded at the carriers' fully distributed costs unless the carriers provide the same services to nonaffiliated entities in a sufficiently large number of cases to establish a market rate.[15] In its further revisions, Contel must verify that each affiliate transaction involving the provision of a service that it proposes to provide at market or prevailing company prices meets the above criteria.[16]

7. The revised manual also uses the term "cost," which is defined as "determined in a manner that complies with the cost allocation standards outlined in Section III of this Cost Allocation Manual and may include an appropriate cost of capital."[17] Section III of Contel's cost manual describes cost as "an attributable cost method of fully distributed costs."[18] The *Joint Cost Order* prescribed the fully allocated cost approach as the one which carriers must follow in assigning costs to its regulated and

nonregulated activities.[19] Contel indicates that it plans to use fully allocated costs. However, the statement that it "may include an appropriate cost of capital" appears to be arbitrary and does not enable us to determine how these capital costs are determined. Consequently, we require Contel to clarify this term. If it does not incorporate a return on investment equal to its authorized interstate rate of return, Contel must justify in detail its proposal to use another return factor.[20] In addition, Contel must explain the criteria it will use to determine to which activity this cost will be applied.

C. Employee Time Reporting

8. The *Contel Order* directed Contel to describe its sampling criteria for survey time reporting, and to define specifically the term "representative." Contel has revised its manual to more fully describe its survey time reporting. The term "representative" has been eliminated from the description of the sampling. Contel indicates that "non-exempt employees who perform billing inquiry, payment and collection and service order processing functions in the business office must participate in the study."[21] It is not clear what is meant by non-exempt employees and Contel is directed to clarify this term. In addition, Contel states that for job activities neither recorded in hours nor based on annual surveys or when employee assignments are permanently changed, a work group study might be performed. In its further revisions, Contel should clarify the term "work group study" and indicate when it is actually used.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

A. Cost Assignment Procedures

9. In its reply to AT&T's comments concerning the initial cost manual, Contel indicated that it would amend Accounts 6311, 6341, 6362, and Accounts 6211 through 6232 by allocating these accounts between regulated and nonregulated activities based on positive time reporting.[22] In its revised manual, Contel states that the basis on which the cost pool for each account is apportioned for Accounts 6311, 6341 and 6362, respectively, is to "assign to regulated and nonregulated based on positive time reporting and direct cost assignment."[23] Since Contel has maintained its use of direct cost assignment and added positive time reporting, it is not clear when it will use either of these methods. Therefore, we direct Contel to clarify, if it is using the results of its positive time reporting to assign the costs in this account to separate regulated and nonregulated pools, that those costs will be directly assigned to regulated and nonregulated activities. If this is not the case, Contel must explain when it will use direct cost assignment and when it will use positive time reporting.[24]

B. Specific Accounts

10. The *Contel Order* required Contel to revise its manual to include accounts,[25] omitted from the initial manual, which are listed in Appendix C to the *Automated Reporting Requirements Order*.[26] In addition, Contel was required to amend its initial manual to explain or modify specific accounts. Contel has complied with these directives. However, we have some comments concerning these revisions.[27]

Account 2124 - General Purpose Computers and Account 6124 - General Purpose Computers Expense

11. The *Contel Order* directed Contel to develop a more cost causative procedure than the general allocator for allocating the costs in these accounts. Contel's revised manual proposes to have one cost pool, general purpose computers, in Account 2124, that will be allocated based on total regulated and nonregulated wages and salaries. Account 6124 also has one cost pool, general purpose computers expense, that is allocated in the same ratio as the investment in Account 2124. We believe that these accounts should have more cost pools covering computer use for activities such as consumer operations, corporate operations and plant operations. Consequently, we again direct Contel to amend its manual accordingly or explain in detail the reasons for having only one cost pool.

Account 4360 - Other Deferred Credits

12. Contel proposes to allocate Account 4360, Other Deferred Credits, between regulated and nonregulated on the basis of a general allocator. Contel must amend its manual to provide a cost causative allocation methodology, such as the apportionment of the investment that generated the credits, for this cost pool or explain in detail why it must resort to the general allocator.

Accounts 5000 through 5280 - Revenue Accounts

13. For Revenue Accounts 5000 through 5270 Contel directly assigns revenue between regulated and nonregulated activities. In the *Further Order on Reconsideration*, the Commission required the carriers to use Account 5280, Nonregulated revenue,[28] to record the nonregulated revenues derived from activities which share assets or revenues with regulated activities. Therefore, we require Contel to list such an account in its further revisions, and indicate that it will be assigned to nonregulated activities.

Account 5301 - Uncollectible Revenue - Telecommunications and Account 5302 - Uncollectible Revenue - Other

14. For uncollectible revenue Accounts 5301 and 5302 Contel assigns uncollectibles to nonregulated or regulated pools, respectively. We are uncertain how Contel can assign any of its uncollectibles to these pools. We, therefore, require Contel to either clarify how it assigns uncollectible revenue to pools or revise its manual to apportion its uncollectible revenue from its telecommunications operation in proportion to its relative telecommunications revenue and its other uncollectible revenue in proportion to its relative non-telecommunications revenue.

Account 6790 - Provision for Uncollectible Notes Receivable

15. In its revised manual, Contel proposes to allocate Account 6790, Provision for uncollectible notes receivable, on the basis of total regulated and nonregulated wages and salaries. Contel also states that the account is used to record uncollectibles associated with employee advances, but does not indicate whether other items may be recorded in these accounts. If this account is used only for recording uncollectibles associated with employee advances, then we find this allocation acceptable. However, if Contel uses or plans to use this account for other types

of notes, then it must amend its manual to allocate these amounts by using direct cost assignment or a more cost causative method.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the October 3, 1988 revisions to Contel's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

17. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than **April 30, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No 87-1764 (filed December 14, 1987).

[2] The Contel Tier 1 operating telephone companies are: Continental Telephone Company of California; Continental Telephone Company of New York, Inc.; Contel of Texas; and Continental Telephone Company of Virginia. In its revisions submitted on October 3, 1988, Contel added Contel of Missouri to its list of Tier 1 operating companies. This action was reversed in its submission on November 30, 1988. In that submission, Contel of Missouri was removed from the list of Tier 1 companies because annual revenues from regulated operations did not meet the criteria set out in the *Commission Requirements For Cost Support Material to be filed with 1989 Annual Access Tariffs*, DA 88-1554, released October 3, 1988. According to this Order, the initial classification of a company as Tier 1 is determined based on whether that company's annual revenues from regulated telecommunications operations has been100 million or more for five immediately preceding years.

[3] Contel Corporation Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 4664 (1988) (*Contel Order*).

[4] *Id.* at 4664, paras. 2-3; *id.* at 4670, paras. 51-52.

[5] Contel Revised Manual, Cover Letter, dated October 3, 1988.

[6] Contel may defer its March 31, 1989 quarterly updates, if any, until April 30, 1989.

[7] *Contel Order*, 3 FCC Rcd at 4665, para 13.

[8] Contel Revised Manual at Section II, page 5.

[9] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd at 199, paras. 33-34 (1988) (*US West Order*).

[10] *Id.*

[11] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5976 (1988) (*NYNEX Compliance Order*).

[12] *Id.* at 5980, para. 20.

[13] *Id.*, *quoting* 47 C.F.R. §32.27(d).

[14] *U S West Order*, 3 FCC Rcd at 199, para. 34; *see* 47 C.F.R. §32.27(d).

[15] *Id.* at 199, para. 33.

[16] If the affiliate transaction involves a transfer of assets, the carrier should record it at the prevailing price held out to the general public, that is, the prevailing company price. If there is no prevailing company price, asset transfers from the affiliate to the carrier should be recorded at the lower of net book cost or fair market value, while asset transfers from the carrier to the affiliate should be recorded at the higher of net book cost or fair market value. Contel's definition relating to transfer of assets should conform to this definition.

[17] Contel Revised Manual at Section II, page 5.

[18] *Id.* at Section III, page 8.

[19] *Joint Cost Order*, 2 FCC Rcd at 1312.

[20] *See Order on Reconsideration*, 2 FCC Rcd at 6298, para. 133, n.203.

[21] Contel Revised Manual at Section IV, page 12.

[22] Contel Reply at 9.

[23] Contel Revised Manual at Section VII, pages 40 - 41.

[24] We note that for Accounts 6211 through 6232 and for Accounts 6411 through 6441 Contel has revised its basis for apportionment to read, "If dedicated and nonregulated investment cost pools are subsequently established, this cost pool will be assigned directly to regulated and nonregulated based on positive time reporting and direct cost assignment." We require that Contel amend its cost manual when these cost pools are established.

[25] *Contel Order*, 3 FCC Rcd at 4667 para. 27-28.

[26] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, Report and Order, 2 FCC Rcd at 5770, 5775 (1987), *modified on recon.*, 3 FCC Rcd 6375 (1988).

[27] In Section VII, page 32, Contel has included a statement in its table stating that "Contel does not anticipate recording investment in Account 2525." We are unaware of any such account and direct Contel to remove this statement or explain its meaning.

[28] *Further Order on Reconsideration*, 3 FCC Rcd at 6702, para. 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPANISH INTERNATIONAL COMMUNICATIONS CORPORATION	**MM DOCKET NOS. 83-540 to 83-544 and 84-830 to 84-834** File Nos. BRCT-830401LM et al.
For Renewal of License of KWEX-TV San Antonio, Texas, et al.	
BAHIA DE SAN FRANCISCO TELEVISION COMPANY	**MM DOCKET NO. 83-545** File No. BRCT-800730KJ
For Renewal of License of KDTV(TV) San Francisco, California	

ORDER

Adopted: February 21, 1989; Released: March 8, 1989

By the Commission: Commissioner Dennis concurring in the result.

1. Now before the Commission are: (a) Request for Declaratory Ruling, filed March 17, 1988, by The Bermuda Trust Company Limited, Lunitron, S.A., and Batis, Ltd. (Petitioners); (b) Statement In Support of Request for Declaratory Ruling, filed March 23, 1988, by The Latcom Group, Inc.; and (c) Response to Request for Declaratory Ruling, filed March 23, 1988, by Hispanic Broadcasting Limited Partnership (HBLP).

I. BACKGROUND

2. In 1983, the Commission designated for hearing the renewal applications for television stations licensed to Spanish International Communications Corporation (SICC), Bahia de San Francisco Television Company (Bahia), and Seven Hills Television Company (Seven Hills) to determine *inter alia* whether the stations were under alien control in violation of section 310(b) of the Communications Act. *See Orders*, 48 Fed. Reg. 28,549 (1983); 48 Fed. Reg. 33,539 (1983); 49 Fed. Reg. 35,691 (1984). In an initial decision, ALJ John H. Conlin found that the licensees had violated section 310(b), and that, as then structured, the licensees were basically unqualified. *Spanish International Communications Corp.*, FCC 86D-1 (Admin. L.J. 1986).

3. The Commission approved a settlement agreement among SICC, Bahia, and Spanish International Network (SIN) and conditionally granted renewals for the stations licensed to SICC and Bahia, subject to the sale of SICC and Bahia to a qualified and unrelated third party. *Spanish International Communications Corp.*, 2 FCC Rcd 3336 (1987), appeal pending sub nom. *Coalition of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. June 26, 1987). The settlement agreement now prohibits individual officers, directors, and shareholders (and their representatives) of either SICC or Bahia, and principals or representatives of a corporate shareholder of SICC from buying SICC or Bahia, from being principals or directors of the entity buying SICC or Bahia, or from acquiring an equity interest in the entity buying SICC or Bahia. *Spanish International Communications Corp.*, 2 FCC Rcd at 3338-39 ¶ 16.

4. After the Commission approved the settlement agreement, the Mass Media Bureau approved the transfer of control of Spanish International Communications Corporation to SICC Holding Corp., and the assignment of the license for the one Bahia station to SICC Acquisition Corp. *Spanish International Communications Corp.*, 2 FCC Rcd 3962 (1987), review denied, FCC 88-219 (July 13, 1988), appeal pending sub nom. *Coalition of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. filed June 26, 1987). SICC Holding Corp. (now Latcom, Inc.) and SICC Acquisition Corp. are controlled, through subsidiaries, by Hallmark Cards, Inc.

5. Pursuant to the Mass Media Bureau's Order approving the transfer of control application, the transfer of Spanish International Communications Corporation to Latcom (formerly SICC Holding Corp.) was consummated on August 6, 1987. On February 22, 1988, the Commission granted a *pro forma* assignment of the license of KDTV, which was originally licensed to Bahia, from SICC Acquisition Corp. to SICC, as now controlled by Hallmark through Latcom. The assignment of KDTV was consummated on February 24, 1988. As a result of these transactions, the new SICC (now a subsidiary of Latcom, which is itself a subsidiary of Hallmark) is the licensee of all six broadcast stations originally licensed to either the old SICC or Bahia.

II. PETITION FOR DECLARATORY RULING

6. The Bermuda Trust Company is the trustee for three trusts that Emilio Azcarraga, Laura Azcarraga de Wachsman, and Carmela Azcarraga de Burillo set up for the benefit of their adult children. Petitioners Lunitron and Batis are beneficially owned by members of the O'Farrill and Aleman families, respectively. All members of the Azcarraga, O'Farrill, and Aleman families are citizens of Mexico. Petitioners request a Declaratory Ruling immediately permitting them to convert into non-voting stock certain Notes issued to members of the Azcarraga, O'Farrill, and Aleman families by Latcom.

7. Univisa, S.A. is the parent of Univision, Inc. (formerly SIN), the United States-based Spanish-language television network, with which the stations formerly licensed to the old SICC and Bahia are affiliated. Together, members of the Azcarraga, O'Farrill and Aleman families held control of Univisa until February 16, 1988, when Latcom acquired all of the stock of Univisa in a transaction independent of the SICC settlement agreement. As a result of the sale of Univisa to Latcom, members of the Azcarraga, Aleman, and O'Farrill families received Notes issued by Latcom. Under the sales agreement with Latcom, the Notes can, upon FCC approval, be converted

into non-voting stock representing a fifteen percent equity interest in Latcom. In other words, the Azcarraga, the Aleman, and the O'Farrill families will together have a 15 percent equity interest in Latcom. Of the total 15 percent, the Azcarraga family will hold an 8.7 percent equity interest in Latcom that, in turn, will be owned by the 15 adult children of Emilio Azcarraga and his sisters, Laura Wachsman, and Carmela Burillo. None of the 15 adult children will own more than a 5 percent equity interest in Latcom.

8. No member of either the O'Farrill or the Aleman families ever had an ownership interest in, or other connection with, Spanish International Communications Corporation that would preclude him or her from acquiring interests in the licensee of the old SICC and Bahia stations under the SICC settlement agreement. However, Emilio Azcarraga and his two sisters, Laura Azcarraga de Wachsman and Carmela Azcarraga de Burillo, indirectly owned 20 percent of Spanish International Communications Corporation.

9. By virtue of their prior ownership interests in Spanish International Communications Corporation, the three Azcarragas are now barred, under the terms of the settlement agreement, from holding equity interests or stock purchase options in Latcom. Because of this restriction, the three Azcarragas placed the Latcom Notes, which are convertible to equity interests in Latcom, in three five-year irrevocable trusts for the benefit of their 15 adult children.

10. To further assure compliance with the restrictions in the settlement agreement, the Univisa sale agreement provides that the Latcom Notes are convertible only on FCC approval. In their Request for Declaratory Ruling, petitioners ask the Commission to declare that the immediate conversion of the Notes to non-voting Latcom stock complies fully with the Communications Act, Commission precedent, and the SICC settlement agreement. Petitioners' Request is unopposed. In response to the Request, HBLP states only that it has appealed the Commission's approval of the SICC settlement agreement to the Court of Appeals. In addition, Latcom filed a statement supporting petitioners' Request for Declaratory Ruling.

III. DISCUSSION

11. For the reasons that follow, we find that, except for Latcom securities held for the benefit of Emilio Burillo, the requested conversion complies fully with the Communications Act, Commission precedent, and the SICC settlement agreement. We find further that the trust documents give Emilio Burillo, who is precluded by the express terms of the SICC settlement agreement from acquiring an equity interest in Latcom at this time, a degree of control over the trustee that is inconsistent with the SICC settlement agreement. Accordingly, subject to the condition that Emilio Burillo agree not to exercise his rights under Article 5 of the Trust Indenture, we grant the Request for Declaratory Ruling, permit the immediate conversion of the Notes into Latcom non-voting stock and permit Bermuda Trust, Lunitron, and Batis to become non-voting stockholders of Latcom.

A. *Compliance with the Communications Act*

12. Section 310(b)(4) of the Communications Act specifies that, in the absence of a public interest finding, "[n]o broadcast . . . license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by . . . any corporation organized under the laws of a foreign country . . . ." 47 U.S.C. § 310(b)(4). Voting and non-voting stock interests are indistinguishable for purposes of section 310(b). *See Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310 (b) (3) and (4) of the Communications Act*, 103 FCC 2d 511, 519 ¶ 14 & n.37 (1985), reconsideration granted in part, 1 FCC Rcd 12 (1986).

13. Here, Latcom is the parent of the new SICC, the licensee of the stations formerly owned by Spanish International Communications Corporation and Bahia. Lunitron, Batis, and Bermuda Trust are foreign corporations. Together they will own non-voting stock representing a 15 percent equity interest in Latcom upon conversion of the Notes. Current alien ownership of Latcom does not exceed 10 percent. *See Spanish International Communications Corp.*, 2 FCC Rcd at 3962-63 ¶ 4 (Mass Media Bureau addressed this question before granting the transfer of control application). Inasmuch as petitioners' Notes are convertible into non-voting Class B common stock representing only 15 percent of the total equity of Latcom, alien ownership of Latcom will not exceed the 25 percent limit specified in section 310(b)(4) as a result of the requested conversion. Moreover, no member of the O'Farrill, Aleman, or Azcarraga families, and no beneficiary of the Azcarraga Trusts, will be an officer or director of Latcom or its subsidiary broadcast licensee. Accordingly, the proposed conversion of debt into stock complies fully with the statute. *See Telemundo, Inc. v. FCC*, 802 F.2d 513, 516 (D.C. Cir. 1986); *Ventura Broadcasting Co. v. FCC*, 765 F.2d 184, 194 (D.C. Cir. 1985) (Commission's determinations to permit alien ownership not exceeding the limits prescribed in section 310(b) upheld).

B. *The SICC settlement agreement*

14. Having concluded that the requested conversion would not exceed the limit on alien ownership specified in section 310(b), we turn to the question of whether the requested conversion is permissible under the SICC settlement agreement. For the reasons that follow, we conclude that, except for securities held in trust for the benefit of Emilio Burillo, the conversion comports fully with the settlement agreement. Accordingly, we will permit petitioners Lunitron, Batis, and Bermuda Trust to convert immediately the Notes issued by Latcom to non-voting stock, representing 15 percent of the equity of Latcom.

15. The settlement agreement precludes any individual officer, director, or shareholder of Spanish International Communications Corporation or Bahia, and any principal or representative of a corporate shareholder of Spanish International Communications Corporation, from having an equity interest in, or a stock option agreement with, the company buying either SICC or Bahia. As noted above, Latcom bought the assets of Spanish International Communications Corporation; and the stations formerly owned by Spanish International Communications Corporation and Bahia are now licensed to the new SICC, a

subsidiary of Latcom. Thus, under the settlement agreement, no officer, director, or shareholder of Spanish International Communications Corporation or Bahia, and no principal or representative of a corporate shareholder of SICC, may now have an equity interest in, or stock option agreement with, Latcom.

16. *Lunitron and Batis:* As no member of either the Aleman or the O'Farrill families ever had an interest in either SICC or Bahia, the settlement agreement does not preclude any member of either the Aleman family or the O'Farrill family from being a Latcom stockholder. Thus, we are not concerned with whether the O'Farrills and the Alemans acquired the specified equity interest in Latcom as part of the sale of Univisa to Latcom. Accordingly, we will permit Lunitron and Batis, on behalf of their respective owners, to convert their Latcom Notes and become Latcom stockholders.

17. *The Bermuda Trust:* As explained above, Emilio Azcarraga and his two sisters, Laura and Carmela, previously had an ownership interest in a corporate shareholder of Spanish International Communications Corporation. Thus, the SICC settlement agreement expressly bars all three Azcarragas from having any equity interest or stock option agreement in Latcom, the parent of the new licensee of the SICC and Bahia stations.

18. However, in accordance with the SICC settlement agreement, none of the three Azcarragas will have any interest in Latcom, or be a director or officer of Latcom upon conversion of the Notes. The Azcarragas have placed the Latcom Notes in three five-year irrevocable trusts for their 15 adult children: The Emilio Azcarraga Milmo Bermuda Trust; The Carmela Azcarraga de Burillo Bermuda Trust; and The Laura Azcarraga de Wachsman Bermuda Trust. The trust documents provide that, upon termination of the five-year trusts, the trustee will distribute to the beneficiaries in equal shares all property then remaining in the trust. Thus, each of the 15 Azcarraga children will have less than a 5 percent interest in Latcom, and together they will have only an 8.7 percent interest in Latcom. However, with one exception discussed below, the Azcarraga children had no connection with SICC or Bahia that might preclude them, under the terms of the settlement agreement, from having an equity interest in Latcom, or any other subsidiary of Hallmark.

19. Of the 15 adult Azcarraga children, only one, Emilio Burillo, is arguably subject to the restrictions contained in the settlement agreement. Emilio Burillo never had an ownership interest in either SICC or Bahia, or in a corporate shareholder of SICC. Nor was Burillo an officer or director of either SICC or Bahia. However, he was one of five vice presidents and one of three assistant secretaries of Laura Investment Company (LICO). LICO is a California corporation, owned by Emilio Azcarraga Milmo, Laura Azcarraga de Wachsman and Carmela Azcarraga de Burillo, which held a 20 percent interest in SICC at the time of the SICC settlement agreement.

20. Whether the restrictions in the SICC settlement agreement should apply to Burillo is a close question. As Bermuda Trust indicates, Emilio Burillo's involvement with LICO was confined to the company's California real estate investments. Moreover, ownership reports that SICC filed with the Commission on March 18, 1983 and December 11, 1985, reflect that LICO's Board of Directors officially empowered Emilio Azcarraga M., and not Emilio Burillo, to act as LICO's representative "to engage in any and all activities for the purpose of selling, transferring or otherwise dealing in and with SICC Shares."

21. Nevertheless, the SICC settlement agreement expressly prohibits any "principal or representative of a corporate shareholder of SICC" from acquiring an equity interest in the entity buying SICC or Bahia, and Emilio Burillo was a principal of LICO, which was a corporate shareholder of SICC. Although we agree that Burillo had only a tangential relationship with SICC, we are not persuaded that we should depart from the express provisions of the SICC settlement agreement. We conclude that the public interest would be best served by strictly construing the settlement agreement. For the reasons set forth below, we find that the trust documents do not contain adequate insulation between Burillo and the trustee. Having found that Emilio Burillo is within the express ownership restrictions contained in the SICC settlement agreement, we grant the declaratory ruling, and permit the immediate conversion of the Notes, subject to the condition that we receive written assurance that Emilio Burillo will refrain from exercising his rights under Article 5 of the Trust Indenture.

22. Because none of the Azcarraga children, except Emilio Burillo, is subject to the restrictions in the SICC settlement agreement, we conclude that they could, subject to the prohibitions on alien ownership set forth in section 310(b) and discussed in paragraphs 12 and 13 above, acquire an equity interest in Latcom outright. In other words, except in the case of Notes held by or for the benefit of Emilio Burillo, we would permit the immediate conversion of the Notes into non-voting Latcom stock if the Azcarraga children, rather than Bermuda Trust, held the convertible Latcom Notes.

23. However, inasmuch as the Azcarragas chose to place the Latcom Notes in trust for the benefit of their adult children, we cannot permit the immediate conversion of the Notes into Latcom stock unless the trust documents afford sufficient assurance that the grantors will not be able to influence the trustee. *See generally Attribution of Ownership Interests*, 97 FCC 2d 997, 1024 ¶¶ 55-56 (1984), reconsidered in part, 58 RR 2d 604 (1985), further reconsidered, 1 FCC Rcd 802 (1986) (Commission criteria for determining the independence of a trustee).

24. Based upon our examination of the trust documents, we are satisfied that the three grantors (Emilio Azcarraga, Laura Wachsman and Carmela Burillo), who are now barred by the settlement agreement from acquiring an equity interest in Latcom, will not be able to use the Latcom stock held in trust for their children to influence the operation of any United States broadcast station.

25. The Indenture of Trust expressly prohibits all communications between the grantors and the trustees.[1] A statement under penalty of perjury from each grantor confirms that "[f]or the duration of the trust [the grantor] will not communicate, directly or indirectly, orally or in writing, with the Trustee on any matter." Each grantor further certifies under penalty of perjury that he has no past or present business relationship with Bermuda Trust other than the relationship created by the Trust Indenture. In this respect, the trust documents proposed here are less problematic than those in *KKR Associates, L. P.*, 2 FCC Rcd 7104, 7107 ¶¶ 18-19, 7107-08 ¶ 22 (1987), where the trustees had existing business relationships with the grantor, and the Commission accordingly had to impose

additional conditions to ensure that the trustees would be insulated from influence by either the grantors or beneficiaries.

26. Furthermore, all three Trusts are irrevocable, and cannot be amended by either the grantors, the beneficiaries, or the trustees. Thus, the grantors are not authorized to remove a trustee under any circumstance. *See Attribution of Ownership*, 97 FCC 2d at 1024 ¶ 56. Although the beneficiaries may replace a trustee, they may do so only in the event of war or political upheaval, or if a court of competent jurisdiction finds the trustee to be legally, physically, or mentally incompetent. *See KKR Associates, L. P.*, 2 FCC Rcd at 7107 ¶ 22 (4). In any event, the Trust Indenture requires that a trustee appointed to fill a vacancy created by the death, resignation, or removal of a trustee "shall have no commercial relationship with the Grantor outside of this trust."

27. By the same token, the trust documents ensure that, for the duration of the trust, none of the Latcom stock will be transferred to the three grantors or to any other individual precluded by the SICC settlement agreement from acquiring an equity interest in Latcom. In this respect, the trust documents explicitly provide that the beneficiaries may direct the sale of Latcom securities only if the sale terminates all connections between Latcom and family members of former SICC shareholders. In addition, the trust documents permit the transfer of Latcom securities only by a public offering or by sale to: Latcom itself or its shareholders; persons who have not been principals of Spanish International Communications Corporation or Bahia, principals or representatives of former corporate shareholders of Spanish International Communications Corporation or Bahia; or persons who have been approved by counsel for Latcom.

28. In view of the foregoing, we find that, with respect to stock held for the benefit of any of the Azcarraga children, except for Emilio Burillo, the trust documents adequately satisfy the restrictions contained in the settlement agreement concerning future connections between the stations formerly licensed to Spanish International Communications Corporation and former directors, shareholders, or principals of that company.

29. Having determined that the trust documents adequately ensure that the grantors will be unable to influence the operation of any United States broadcast station through the Latcom stock held in trust for their children, we turn to the question of whether Emilio Burillo will be able to use the Latcom stock held in trust for his benefit to influence the operation of any United States broadcast station. As a former principal of a corporate stockholder of SICC, Burillo, unlike the other beneficiaries of the trust, is not exempt from the SICC settlement agreement, which prohibits such individuals from acquiring an equity interest in Latcom at this time.

30. Based upon our examination of the trust documents, we are not satisfied that there is adequate insulation between the trustee and the beneficiaries to prevent Emilio Burillo from controlling the Latcom stock, in violation of the SICC settlement agreement. Article 5 of the Trust Indenture empowers the beneficiaries to direct the trustee to redeem, sell, dispose, or transfer any Latcom stock or securities in accordance with the Note Purchase Agreement or to effect a sale to anyone other than the Grantor. Article 5 further permits the beneficiaries to direct the trustee to refrain from exercising certain rights relating to any Latcom securities. In addition, Article 5 authorizes the beneficiaries to direct the trustees to exercise any right concerning the release or substitution of collateral under the Pledge Agreement.

31. In our view, the right to exercise, or refrain from exercising, rights relating to the disposition of securities is indistinguishable from the rights that the equity owner of such securities would ordinarily enjoy. In this regard, the Trust Indenture prevents the beneficiaries from directing the trustee to sell Latcom securities to the Grantors (Emilio Azcarraga, Carmela Burillo, and Laura Wachsman), but it does not restrict the beneficiaries from directing the trustee to sell the securities to anyone else. We find that Emillio Burillo's right to direct the trustee to handle the stock in this manner is inconsistent with the SICC settlement agreement, which prohibits him from holding Latcom stock outright. Accordingly, we will permit the immediate conversion of the Notes into nonvoting stock, subject to the condition that we receive an affidavit from Emilio Burillo stating that he will not exercise any of his rights under Article 5 of the Trust Indenture.

IV. ORDERS

32. ACCORDINGLY, IT IS ORDERED, That the Request for Declaratory Ruling, filed March 17, 1988 by The Bermuda Trust Company Limited, Lunitron, S.A., and Batis, Ltd. IS GRANTED subject to our receiving an affidavit from Emilio Burillo stating that he will not exercise any rights under Article 5 of the Trust Indenture.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Article 15 of the Trust Indenture also provides that the *trustee* may not communicate with the beneficiaries regarding the exercise of rights for any Latcom security or in connection with Latcom's broadcast business. *See KKR Associates*, L.P., 2 FCC Rcd at 7107 ¶¶ 22(1)-22(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND CONSUMER ACTION
Complainants.

v.

CENTRAL CORPORATION	File No. E-88-104
INTERNATIONAL TELECHARGE, INC.;	File No. E-88-105
NATIONAL TELEPHONE SERVICES, INC.;	File No. E-88-106
PAYLINE SYSTEMS, INC.; AND TELESPHERE NETWORK, INC.	File No. E-88-107 File No. E-88-108

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1989; Released: February 27, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us a formal complaint filed by Telecommunications Research and Action Center (TRAC) and Consumer Action (CA) (together "TRAC/CA"), two not-for-profit consumer advocacy groups, against the above-named providers of alternative operator services (AOS).[1] The complainants request that the Commission find the defendant AOS companies to be dominant carriers, revoke any operating authority under which the Defendants are operating, order them to cease and desist from offering service, and find that the rates and practices of the defendants are unjust and unreasonable in violation of Section 201(b) of the Act. For the reasons set forth below, the complaint is granted in part and denied in part.

II. BACKGROUND

2. This complaint grows out of the activities of a new segment of the partially deregulated telecommunications industry, the "alternative operator services", or "AOS" providers' industry.[2] Indeed, Commission policy encourages the entry of new competitors in interstate and international service markets. This open entry policy provides competitive prices and stimulates the introduction of innovative new service and consumer options. Generally, AOS companies lease long distance lines from interexchange carriers and combine that transport element with their own operator services. The AOS companies then enter into agreements with client companies, called "call aggregators", who typically are hotels, motels, hospitals, universities, airports, and other businesses and organizations that have telephones available to transient users. Under these agreements, the call aggregator's customers are automatically connected to the AOS provider when they make certain operator assisted long distance calls. [3] In the case of such agreements, the telephones on the call aggregator's premises are said to be "presubscribed" to the particular AOS company.

3. An AOS company's operator services are generally associated with "0+" calls, *e.g.*, collect, third-party billed, and credit card calls (including calls made with telephone company calling cards and major credit cards).[4] For the services they provide, each AOS company charges its own rates, which in addition to a return on investment are allegedly designed to recover the costs of leasing the underlying long-distance transport, plus their own costs of providing the operator assistance. Local exchange carriers (LECs) generally bill customers and collect payments for AOS companies in accordance with contracts between the AOS provider and the LEC or, in some instances, under intrastate rate schedules. Calls billed to a telephone company calling card will often appear on the user's monthly telephone bill. Calls billed to a bank or consumer credit card (e.g. MasterCard, Visa, etc.) appear on that credit card bill rather than on a monthly telephone bill.

4. In the aftermath of the AT&T divestiture and the ongoing changes in regulation of the telecommunications industry, consumers have understandably experienced a certain amount of confusion as the traditional ways of obtaining and using telephone service have given way to the sudden appearance of new options and alternatives in an increasingly competitive environment. So too has the advent of AOS brought with it its share of confusion and complaints. The Commission has received a large number of informal complaints involving AOS carriers, many of which involve the defendant companies. In many cases, consumers claim they were not adequately informed by the call aggregator or the AOS provider that their call would be handled by an AOS company or what charges would be incurred. In other instances, consumers complain that they were unaware of the existence of numerous AOS companies as opposed to traditional service providers. Since each AOS company charges its own individual rates, even when the caller uses another telephone company's calling card, and because of the rate variations that may result from technical anomalies such as "call splashing",[5] some consumers have expressed surprise and confusion over their bills. Along with complaints about rate levels and improper billing, other informal complaints have arisen from the practice of "call blocking".[6] In short, call blocking and splashing, coupled with the fact that many AOS companies charge rates higher than AT&T, have led to consumer dissatisfaction with some of the AOS providers and, in turn, to complaints such as the instant one.

III. CONTENTIONS

5. The complainants, relying principally on the Commission's orders in the *Competitive Carrier* proceeding[7] argue that the defendant AOS companies fit the Commission's definition of a firm with market power and therefore should be regulated as dominant carriers. As dominant carriers, complainants contend, the defendants are providing services without the requisite authorization pursuant to Section 214 of the Communications Act, 47

U.S.C. § 214[8] and should be ordered immediately to cease and desist from providing such service. Complainants advance two arguments in support of their claim of market power. First, complainants cite what they perceive as the inability of market forces to constrain AOS rates and practices. They argue that because of a lack of factual information end-users are unable to make market decisions as to which carrier to use in certain circumstances and thus the defendants are able to charge prices above those of their underlying carrier, *e.g.*, AT&T, MCI and US Sprint, without losing market share in these circumstances. Second, the complainants allege that the ability of the AOS providers and their call aggregators to control the facilities where calls are routed (*i.e.*, the PBX equipment on the call aggregators' premises) and engage in call blocking clearly establishes that the defendants possess market power. Citing the Commission's *First Competitive Carrier Order*, the complainants contend that the exercise of control by the defendents over these bottleneck facilities is *prima facie* evidence of their market power.[9]

6. As a separate but related matter, the complainants assert that the rates charged by defendants are exhorbitant and therefore unjust and unreasonable in violation of Section 201 of the Communications Act, 47 U.S.C. § 201.[10] Complainants contend, in effect, that the Commission established a standard in *Competitive Carrier* which provides that the underlying carriers' rates operate as a "just and reasonable" ceiling on the resellers' rates and that a reseller may not price its services above the underlying carrier.[11] Complainants argue that since the rates charged by the defendants are in excess of those charged by AT&T, they must be found to be unjust and unreasonable within the meaning of Section 201.

7. An adjunct of complainants' market power contention is the claim that call splashing and call blocking are unreasonable practices. They contend that because AOS providers typically fail to identify themselves or notify consumers that they will pay rates higher than AT&T's, the effect of these practices is to leave uninformed or captive consumers[12] with no practical alternative but to pay the higher rates. The Complainants argue that such practices are contrary to the public interest and provide adequate grounds to revoke the operating authority of the defendants.

8. The arguments advanced by the various defendants in response to the complainants' allegations are for the most part identical in their essentials. Therefore we will summarize the arguments as if they were part of the same pleading. Insofar as individual defendants set forth unique arguments, they are treated individually. The central thrust of the defendants' collective response is that:

> 1. they are not dominant carriers, since none of them possess market power over any bottleneck facility;[13]
>
> 2. no case has been made that their rates are unjust or unreasonable;[14] and
>
> 3. they either do not engage in the practices that are alleged to be unlawful, or in those limited instances in which they do, such practices are not unjust or unreasonable.[15]

Moreover, the companies affirmatively assert that their presence in the marketplace is pro-competitive and that they now provide or are developing and will soon provide innovative services that AT&T does not provide, such as the use of bank credit cards, multilingual operators, voice messaging and voice mail.[16]

IV. DISCUSSION

9. As an initial matter, we note that the defendant companies are resellers as defined in *Competitive Carrier*[17] and as such, are classified as non-dominant carriers under our current regulatory scheme. Our decision to classify resellers as non-dominant was based on our finding that given the low barrier of entry into the resale industry, resale carriers faced more actual and potential competition than any other part of the telecommunications industry.[18] The policies adopted in *Competitive Carrier* are intended to enable resellers and other non-dominant carriers to respond to the demands of a competitive marketplace without unnecessary regulatory constraints. We deny the complaint to the extent that it requests that we depart from the conclusions and policies established in *Competitive Carrier*. The instant complaint, insofar as it seeks the reclassification of certain types of resellers, is a request for modification of the Commission's rules as developed in the *Competitive Carrier Orders*. We cannot, of course, modify our rules in the context of this complaint proceeding. In any event, consistent with the policies set forth in *Competitive Carrier*, we are satisfied that our complaint process and the remedial actions set forth herein fully redress the complainants' grievances.

10. We turn next to the issue of alleged unjust and unreasonable rates. The complainants have relied solely on the assertion that the defendants' rates are in excess of rates charged by AT&T, the assumed underlying carrier.[19] Complainants have cited no Commission authority to support their implicit proposition that a carrier's rates can be found "unjust and unreasonable" solely on the basis that they exceed the rates of some other carrier. The quantity and quality of services vary among carriers as do their underlying cost structures, all of which could support significant differences in rate levels. Based on the record, we find no facts or arguments which would be legally sufficient to sustain a finding that the defendants' rates are unjust and unreasonable within the contemplation of Section 201 of the Act.[20]

11. Finally, we address the complainants' allegations of unjust and unreasonable practices on the part of the defendants in their provision of AOS services. Part of the rationale underlying the Commission's decision in *Competitive Carrier* to relieve resellers and other non-dominant carriers from unnecessary and counterproductive regulatory constraints was the recognition that competitive forces in the marketplace would ensure compliance with the Communications Act.[21] The Commission found that, in general, carriers with little or no market power were incapable of charging rates or engaging in practices which contravene the "just and reasonable" requirements of the Act.[22] In relieving non-dominant carriers from tariff filing requirements, the Commission acknowledged that Title II of the Act serves as a primary means to ensure that consumers are provided access to necessary information and to ensure that the Act's objective of just and reasonable rates and practices were met.[23] The Commission emphasized, however, that in the event marketplace forces prove to be inadequate, remedial actions as may be necessary to protect the public may be taken.[24]

12. Therefore, in addressing complainants' allegations regarding the defendants' practices, we place particular importance on those statements in the record which describe the nature and level of consumer information that the respective defendant companies have provided to their caller/customers. We are also aware of the volume of informal complaints the Bureau has received that confirm the existence of many of the problems that are at issue here.[25] We are particularly concerned with the current practices of some of the defendant AOS companies regarding consumer disclosure, call blocking and call splashing. These practices distort and impede the operation of a fully competitive operator services industry. After consideration of the arguments and evidence advanced by the parties to this proceeding, we are persuaded that the practice of call blocking, coupled with a failure to provide adequate consumer information, is unjust and unreasonable in violation of Section 201(b) of the Act. We recognize that some of the defendant AOS companies deny engaging in such practices[26] and find the record unclear with respect to specific practices of each company. Nevertheless, we will require that to the extent that the defendant AOS companies engage in the practices we find unreasonable herein, they must adopt certain revised procedures with respect to consumer notice and call blocking. Moreover, compliance by any other operator service providers with the requirements set forth below will constitute an absolute defense to complaints based on the allegations addressed in this Order.

13. In order to carry out the policies of the Commission's *Competitive Carrier* decisions and to eliminate the unreasonable practices identified above, we order three specific forms of relief. First, the defendant AOS companies must provide consumer information to their customers in the form of tent cards, phone stickers, or some other form of printed documentation that can be placed on, or in close proximity to, all presubscribed phones. These materials shall set forth the company's identity (name, address and a customer service number for receipt of further information) as well as information to the effect the company's rates will be quoted on customer request. Contracts with call aggregators must contain provisions requiring aggregators to display these materials on, or in close proximity to, all presubscribed telephones. In addition, the defendants must amend existing contracts with call aggregators to reflect this requirement. The defendants will bear primary responsibility for the implementation of the above-specified form of notice, and must make reasonable efforts to assure such implementation within sixty (60) days of the effective date of this Order.

14. Second, we note that at least one of the defendants did not specify the degree to which it engages in "call branding".[27] We find, however, that even the best examples of call branding practiced by the defendants[28] convey insufficient information as to the company's identity, rates, practices, and range of services. This gap in consumer information thwarts effective consumer choice and creates the opportunity for any AOS company to charge excessive rates. For this reason, we find it an unlawful practice for operator services providers not to identify the company before a call is connected, including a sufficient delay period to permit a caller to hang up and/or advise the operator to transfer the call to the customer's preferred carrier. We order this procedure to be implemented by the defendants immediately with the effective date of this Order.

15. While the defendant companies, with one exception,[29] deny that they block calls, it is clear from the information available to us that call blocking in fact occurs.[30] Frequently, contracts between an AOS provider and its customer provide or permit call blocking by the customer. We find that call blocking of telephones presubscribed to the defendant AOS providers or other carriers is an unlawful practice. Accordingly, we order the defendants to discontinue this practice immediately. The defendants must amend their contracts with call aggregators to prohibit call blocking by the call aggregator within thirty days of the effective date of this Order.[31]

16. Call splashing, the process of indirectly routing a call when a caller requests that the call be handled by a different carrier, often results in charges that are different than expected because the call has not been properly rated. Since the transferred call is often billed from a point other than its originating location, the consumer will often receive a bill which appears to be incorrect, either as to the rate charged for the call, or the location called from, or both.[32] While the actual levels of call splashing may vary among the five defendants, we are concerned that its effects be minimized. One possible method of addressing this problem is identified by Payline in its answer to the complaint. According to Payline, it attempts to absorb any charges itself which result from call splashing.[33] Even Payline admits, however, that it has not been able to successfully address this problem in many instances.[34]

17. The problem of call splashing reflects the technological characteristics of the network for which a solution can best be found through the cooperation of service providers including the Bell Operating Companies and AT&T on an industry-wide basis. Because we are concerned that this practice may have an adverse economic impact on consumers, we are requiring the defendant AOS companies to bring this matter before the Carrier Liaison Committee of the Exchange Carrier Standards Association. We understand that both hardware and software problems may need to be addressed in any ultimate resolution of this matter and we require the defendants to provide a progress report within sixty days. The defendants are required to eliminate immediately any call splashing that is within their technical capability to accomplish with their current networks.[35] The Bureau's Enforcement Division will closely monitor progress towards a resolution of this networking problem.[36]

V. CONCLUSION

18. In sum, we find in this order that the practices identified in the paragraphs above, namely, paragraphs 12, 13, 14 and 15 constitute unreasonable practices in violation of Section 201(b) of the Communications Act. To remedy these problems, we identify two mechanisms which will assure that consumers are properly protected – the identification of the primary carrier and related information on or in the vicinity of the telephone and a specific identification of the company by the service provider on line prior to connecting a call. Further, we order the defendants to give rate information on request to consumers and declare the call blocking practices identified in the complaint to be unlawful. Finally, we have put a mechanism in place for dealing with the industry-wide technical problem of call splashing. Implementation

of the remedies identified herein by any other carrier, including AT&T, constitute a defense against similar complaints.

19. These remedies, taken collectively, should assure that sufficient information and options will be made available to consumers in order to facilitate informed decisionmaking. The consumer should be the key determinant of which companies in the operator services industry thrive and which companies do not succeed. If the consumer concludes that some or all of these companies provide services that they want, the industry will expand and be financially sound. The steps taken in this Order will permit those consumer choices to be made soundly and rationally.

20. Accordingly, IT IS ORDERED, pursuant to the provisions of Sections 4(i), 4(j), 201(b), and 208 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b) and 208, and pursuant to authority delegated in Section 0.291 of the Commission Rules, 47 C.F.R. § 0.291, that the "Complaint and Petition to Revoke Authority to Operate," filed by Telecommunications Research and Action Center and Consumer Action on July 26, 1988, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

21. IT IS FURTHER ORDERED, that the "Petition to Intervene" filed on behalf of the State of Connecticut Office of Consumer Action IS GRANTED.

22. IT IS FURTHER ORDERED that the policies and procedures set forth and adopted herein shall become effective thirty (30) days from the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The defendants referred to herein are as follows: Central Corporation (Central); International Telecharge, Inc. (ITI); National Telephone Services, Inc. (NTS); Payline Systems, Inc. (Payline); and Telesphere Network, Inc. (Telesphere). In addition to defendants' answers, other pleadings filed in this matter include: a Motion to Respond in Consolidated Manner and Clarify Pleading Schedule, a Motion to File Late Pleading Schedule, a Motion to File Late Pleading, a Reply to Answers to Complaint and Petition to Revoke Authority to Operate, a Motion to File Corrected Copy, and a Corrected Copy of the Reply to Answers to Complaint and Petition to Revoke Authority to Operate filed by TRAC/CA; an Opposition to TRAC/CA's Motion to Reply in Consolidated Manner and Clarify Pleading Schedule, and a Motion to Dismiss filed by Telesphere. TRAC/CA's Motions were granted on September 13, 1988. *Order*, DA 88-1432. Finally, the State of Connecticut Office of Consumer Counsel filed a Petition to Intervene on August 31, 1988 for the purpose of monitoring the proceeding. We grant the motion.

[2] As the AOS industry has grown, some participants have objected to the term "alternative" since it implies, they argue, that their companies are defined only in the context of being an alternative to AT&T. In response, they have urged the substitution of the acronym "OSP" (for "operator service provider") for AOS. While noting the concerns of those members of the industry who prefer the term "OSP" industry, the more prevalent AOS acronym will be used in this proceeding.

[3] AOS providers may also provide operator services for other interexchange carriers under contract.

[4] While the complaints only address "0+" calls, the issues and remedies are equally applicable to "1+" calls, which include calls from coin operated telephones which are paid in cash, so-called "sent paid" telephone calls.

[5] Call splashing occurs when a caller requests a transfer from an AOS company operator to his preferred interexchange carrier. Since the call is handed off to the preferred carrier in the city where the AOS company's operations center and switch are located, the point from which the call will be billed will often be different from the caller's originating location, and the call may be billed at a rate different than the caller may have anticipated.

[6] Call blocking refers to the process of screening the calls dialed from the presubscribed telephone for certain predetermined numbers, and preventing or "blocking" the completion of calls which would allow the caller to reach a long distance telephone company different from the AOS company.

[7] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization: Notice of Inquiry and Proposed Rule Making*, 77 FCC 2d 308 (1979) (*Notice*); *First Report and Order*, 85 FCC 2d 1 (1980) (First Competitive Carrier Order); *Further Notice of Proposed Rule Making*, 84 FCC 2d 445 (1981) (*Further Notice*); *Second Report and Order*, 91 FCC 2d 59 (1982) (*Second Competitive Carrier Report*), *recon. denied*, 93 FCC 2d 59 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983) (*Fourth Competitive Carrier Order*); *Fifth Report and Order*, 98 FCC 2d 1191 (1984) (*Fifth Competitive Carrier Order*); *Sixth Report and Order*, 99 FCC 2d 1020, *vacated and remanded sub nom.*, MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[8] Section 214 provides in pertinent part:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.

[9] *First Competitive Carrier Order* at 21.

[10] Section 201(b) provides that:

> All charges, practices, classifications, and regulations for and in connection with such communications service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.

[11] *Complaint* at para. 15.

[12] The Complainants maintain that any suggestion that the informed consumer can find another telephone is not feasible. The Complainants state that it is virtually impossible for many consumers (hospitalized patients, college students in a dorm where all telephones are presubscribed to the AOS service, etc.) to gain access to a non-presubscribed telephone. Complaint at para. 22.

[13] *See, e.g.*, ITT Answer at 16-17, Appendix A at pp. 20-21; Payline Answer at 13; Telesphere Answer at 14; NTS Answer at 16.

[14] *See, e.g.*, Central Answer at 5; Telesphere Answer at 5-6; ITT Answer at 7, 19; Payline Answer at 15.

[15] NTS Answer at 11-12; Payline Answer at 17-19; ITT Answer at 20-21; Central Answer at 4-5.

[16] Central makes the additional claim that it is a carrier described in Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b), and as such, is not subject to the Commission's Section 208 complaint procedures. No support is provided for their claim that they are a 2(b)(2) carrier and we find it to be without merit.

[17] The *Second Competitive Order* defines resellers as those carriers which do not own any transmission facilities but obtain basic communications services from underlying carriers for resale purposes. 91 FCC 2d at 70.

[18] *First Competitive Carrier Order* at 29.

[19] We note that complainants have not placed any specific information into the record regarding the identification of underlying carriers, but have assumed in most cases that it is AT&T.

[20] Contrary to complainants' contention, the Commission did not establish a standard in the *Second Competitive Carrier Order* which requires that resellers price their services at a level no higher than the underlying carrier's rates. Rather, the Commission noted that the underlying carrier's rates, which are constrained by Sections 201-205 of the Act, would effectively discipline a reseller's rates because, if "a reseller were to set its price above the rates of the underlying carrier or competing carriers, its customers would be expected to migrate to these other services." *Second Competitive Carrier Order* at 69. We find that the basis of the "AOS problem" is not their rates per se, but the practices involving lack of notice and blocking that restrict a customer's ability to "migrate to these other services [of competing carriers]", as we contemplated in the Competitive Carrier proceeding. It is these restrictive practices that we proscribe in this Order.

[21] *First Competitive Carrier Order* at 20.

[22] *Id.*

[23] *Second Competitive Carrier Order* at 70-71. Section 203(a) of the Act requires common carriers, with limited exceptions, "to file and keep open for public inspection" schedules showing all charges for interstate and foreign wire or radio communications.

[24] *Id.* at 70.

[25] The Bureau's Informal Complaints and Public Inquiries Branch has received approximately two thousand complaints and inquiries regarding AOS rates and practices since January 1988.

[26] *See, e.g.*, Central Answer at 5; ITI Answer at 5.

[27] *See* Central Answer at 5. Branding is the process or procedure used by a carrier, in this case the AOS provider, to identify itself to every person who uses its service.

[28] *See e.g.*, Payline Answer at 22; Telesphere Answer at 18.

[29] *See*, NTS Answer at 20.

[30] *See, e.g.*, Telesphere's Answer at 14, where Telesphere states that Telesphere "does not control the handling of calls by call aggregators" and NTS' Answer at 16, where NTS states that "it does not block calls that reach its network" and that it "does not request or require call aggregators that are its customers to block calls made to other carriers and divert them to NTS."

[31] We note that some companies claim to use call blocking to prevent fraudulent use of the network. Companies who wish to argue that such blocking should be permitted are free to seek a waiver of the "no blocking" requirement accompanied by the requisite showing that such a waiver is warranted. Absent the grant of such a waiver, companies may not engage in blocking.

[32] *See*, NTS Answer at 18.

[33] Payline Answer at 17-19.

[34] Payline Answer at 19.

[35] We note that NTS filed with the Commission a petition seeking a Commission declaration that AT&T be required to establish through rates for transferred calls and a division of charges as a solution to call splashing. *See* "Petition for Order to Require AT&T to Establish a Through Rate and Reasonable Division of Charges," File No. ENF-89-02, filed November 15, 1988. We are in no way prejudging our review of the positions set forth in that proceeding.

[36] Many of the problems associated with call splashing may be eliminated when call blocking ceases, since customers will be able to dial their carrier of choice directly.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-579,
Phase II

In the Matter of

Access Billing Requirements
for Joint Service Provision

Ameritech Operating Companies

ORDER

Adopted: February 24, 1989; Released: February 28, 1989

By the Chief, Common Carrier Bureau:

1. On December 1, 1988, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of certain requirements set forth in an Order released by the Common Carrier Bureau on October 4, 1988.[1] In our *October 4 Order*, we directed local exchange carriers (LECs) to clarify in their tariffs that in cases in which LECs providing joint access service have separate rate elements for the fixed and distance sensitive portions of their channel termination rates, billing percentages only apply to the distance sensitive portion.[2] These tariff changes were required to be filed on December 1, 1988, to be effective on at least 45 days' notice.[3]

2. Ameritech explains that currently, in any case in which one of its companies terminates one end of a special access circuit,[4] a billing percentage is applied to the channel mileage fixed (CMF) rate.[5] Ameritech intends to change this practice by restructuring its special access mileage rates to separate the fixed portion and eliminate application of the billing percentage to the same.[6] According to Ameritech's schedule, the changes will not be implemented until the third quarter of 1989.[7] Therefore, Ameritech requests that the Bureau postpone the above-mentioned *October 4 Order* requirements, as they apply to Ameritech, until its scheduled deadline, *i.e.*, the third quarter of 1989.

3. In support of its request Ameritech argues that to hasten the implementation process it has already begun would cost it an additional 3 million, as other necessary changes cannot be implemented until the third quarter of 1989. Manually adjusting special access bills, according to Ameritech, would also be expensive. Furthermore, Ameritech states, since only its costs are recovered under its rate structure, customers would not be overcharged if the waiver is granted. Therefore, it is unnecessary to implement an immediate change in its billing system.[8] Hence, Ameritech concludes that the public interest will be best served by allowing it to defer the changes required by the *October 4 Order* until Ameritech's target date for the restructuring of its mileage rates -- the third quarter of 1989.

4. Ameritech has demonstrated good cause for granting this waiver request. No benefit to customers will be gained by requiring Ameritech to implement the changes sooner than it has scheduled them. In addition, no interexchange carriers (ICs) or other parties have opposed Ameritech's proposed schedule.

5. IT IS THEREFORE ORDERED that the waiver petition filed by the Ameritech Operating Companies in the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Phase II, DA 88-1544, released Oct. 4, 1988 (*October 4 Order*). Ameritech filed Transmittal No. 244 along with its waiver request. Transmittal 244 implements other requirements established in the *October Order*.

[2] *Id.* at para. 88. The industry reference for billing percentages involved in meet point billing is the National Exchange Carrier Association Tariff F.C.C. No. 4. *See* Multiple Exchange Carrier Access Billing (MECAB) Guidelines, Sections 4.01 to 4.03.

[3] *October 4 Order* at para. 94.

[4] The Ameritech waiver request is not applicable to switched access services as they are presently priced according to the Bureau's *October 4 Order*.

[5] Ameritech Description and Justification (D&J) at 3.

[6] *Id.*

[7] *Id.*

[8] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-579
Phase II

In the Matter of

Access Billing Requirements
for Joint Service Provision

Access Tariff Revisions to
Implement Meet Point Billing

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1989; Released: February 28, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 16, 1988, American Telephone and Telegraph Company (AT&T) filed a petition to reject tariff revisions filed by 16 local exchange carriers (LECs) on December 1, 1988.[1] These tariff revisions were filed in response to the Common Carrier Bureau's October 4, 1988, Order in the above-captioned proceeding.[2] Twelve of the 16 LECs filed replies urging the Commission to deny AT&T's petition.[3] The tariffs are due to become effective March 1, 1989.

2. For the reasons given below, we are denying AT&T's petition and allowing the challenged tariff revisions to take effect. Furthermore, we are requiring additional filings from ALLTEL Illinois and NYNEX.

II. BACKGROUND

3. The Commission and the Bureau have considered meet point billing questions, which arise when access services are provided by two or more exchange carriers, on various occasions since 1983, when the first access tariff filings contained two optional provisions covering the billing of access services provided by more than one carrier. The first option, single company billing, was rejected by the Commission in 1984 because it effectively allowed a carrier providing service to charge rates based on the tariff of a carrier not providing the service.[4] The other option, meet point billing, was the subject of a report filed in December 1986 by the Meet Point Billing Task Force of the Exchange Carrier Standards Association, Inc. (ECSA). The report (ECSA Report), adopted by ECSA's Ordering and Billing Forum (OBF), contained proposals for implementing meet point billing.

4. Specifically, the ESCA Report elaborated on two options -- the single bill option and the multiple bill option. The ECSA Report noted that the single bill option could take one of three forms -- single bill/multiple tariff, single bill/pass-through tariff, or single bill/single tariff. The ECSA Report concluded that all the LECs involved in providing access service for a particular meet point should agree on one alternative in order to implement the single bill option. In its *July 1987 Order*,[5] the Commission accepted ECSA's determination that this option, in one of its three forms, was preferable to the multiple bill option because the former enhances billing accuracy and customer verification.[6] The Commission stated, however, that it would allow continuation of the multiple bill option as a default option, in recognition of the circumstances of small LECs and LECs that had already implemented multiple bill meet point billing. The multiple bill option would also be available as a last resort if the LECs involved could not reach an agreement, but the Commission emphasized that it should be used as a default option only.[7]

5. In our *October Order*,[8] the Bureau directed those LECs that had not yet justified their use of the multiple bill option, and were unable to implement or to complete the implementation of the single bill option, to justify their use of the multiple bill option in a December 1, 1988, filing.[9] Furthermore, that Order directed each LEC that participates in multiple billing to attach to its December 1 filing a sample bill demonstrating compliance with the Multiple Exchange Carrier Access Billing (MECAB) Guidelines recommended in the ECSA Report.[10] AT&T's petition challenges the December 1 filings of 16 LECs as having failed to comply with the *October Order*.

III. SUMMARY OF PLEADINGS

6. In its petition, AT&T essentially divides the LECs into two categories -- those LECs that did not submit bills with their December 1 filings and those LECs that submitted bills AT&T asserts are deficient under the *October Order* requirements. The first category can be further divided into two subcategories -- those LECs that did not submit any sample bills[11] and those that did not submit sample special access bills, but submitted sample switched access bills.[12]

7. Regarding the first category of LECs, AT&T asserts that Bell Atlantic and Chillicothe have improperly failed to submit any sample bills with their December 1 filings, while Nevada Bell, NYNEX, Pacific Bell, TUECA, GTOC, and Walnut Hill are accused of failing to file sample special access bills with their respective December 1 filings.

8. As to the second category of LECs, AT&T contends that the sample bills they filed are defective. Among the faults enumerated by AT&T are: sample switched access bills which fail to include "Billing Account References" and "Billing Account Cross References" (ALLTEL Illinois and NYNEX); sample switched access bills which fail to identify the "Initial Billing Company Bill Date" and the "Initial Billing Company From and Thru Dates" (ALLTEL Illinois, Nevada Bell, NYNEX, Pacific Bell, and Rochester); sample special access bills which fail to identify the "Other Exchange Carrier" (all LECs listed in the Appendix of this Order); and sample special access bills which fail to identify the "Common Circuit Identifier" (ALLTEL Illinois and Great Plains).[13] It is for these reasons that AT&T has petitioned to reject the 16 tariff transmittals filed on December 1.

9. The two carriers AT&T claims did not submit sample switched access bills are Bell Atlantic and Chillicothe. In its reply, Bell Atlantic admits that it did not include such a sample bill with its filing. It explains that it is working

to convert as soon as possible to single billing,[14] and includes a sample switched access bill with its reply.[15] Chillicothe also admits to not submitting a bill, but argues that it is not required to file one under the *October Order* because its tariff provides for the use of single billing.[16]

10. GTOC, Nevada Bell, NYNEX, Pacific Bell, and TUECA all admit that they did not submit sample special access bills. They separately argue, however, that the *October Order* does not require them to file such sample bills.[17] They explain that the *October Order* defers the requirements for meet point billing special access services to the OBF for analysis and development of recommendations.[18] The only other LEC AT&T says failed to file a sample special access bill is Walnut Hill.[19] Unlike the other LECs, however, Walnut Hill argues that it did file a sample special access bill and that AT&T is incorrect in asserting otherwise.[20]

11. There are two LECs, ALLTEL Illinois and NYNEX, which failed to file sample switched access bills containing "Billing Account References" and Billing Account Cross References." In response to AT&T's petition, ALLTEL Illinois asserts that while the sample bill it submitted may not have been clear, the information AT&T is concerned with was included in the bill. To demonstrate its compliance with the *October Order* requirements, ALLTEL Illinois attached a sample bill from ALLTEL Arkansas, Inc., to its reply.[21] In addition, ALLTEL Illinois asserts that its ALLTEL Arkansas bill should be accepted as a valid sample bill since the ALLTEL Illinois bill uses the same format.[22] NYNEX admits that its sample bill does not contain the information alleged to be missing by AT&T, but contends that it is working to remedy the situation as soon as possible. It estimates that NYNEX's switched access bills will contain the information at issue here, commencing in August 1989.[23] In addition, NYNEX does not believe that ICs will be "unduly burdened in the interim" by NYNEX's delayed compliance with the *October Order*.[24]

12. Five LECs, according to AT&T, failed to identify the "Initial Billing Company Bill Date" and the "Initial Billing Company From and Thru Dates" in their sample switched access bills filed on December 1. ALLTEL Illinois and NYNEX offer the same arguments here as they did in reply to AT&T's allegation regarding the two billing reference categories. Nevada Bell and Pacific Bell both argue that AT&T is simply incorrect and that the billing dates to which AT&T refers are included in their sample bills.[25] Finally, Rochester admits that AT&T is correct about Rochester's sample bill not containing this information, and says it will begin to include this information in its bills as of January 1, 1989.[26]

13. Finally, AT&T states that all of the LECs listed in Appendix A of its petition failed to include the designation of "Other Exchange Carrier" in their sample special access filings, and furthermore, that ALLTEL Illinois and Great Plains failed to identify the "Common Circuit Identifier" in their sample special access bills.[27] None of the LECs addressed these issues on the grounds that the *October Order* did not require them to file sample special access bills, therefore making these issues moot.[28]

IV. DISCUSSION

A. *Nonsubmission of Sample Bills*

14. The first issue before us involves the submission of sample special access bills. The *October Order* clearly defers all meet point special access issues until after the submission of an OBF Report, due on April 3, 1989, specifically addressing the special access implications of meet point billing.[29] The OBF Report will recommend guidelines to the Commission governing meet point billing for special access services. Until the Commission reviews and adopts such guidelines, LECs are not expected to submit sample special access bills. Hence, AT&T is incorrect on this point.

15. AT&T is also incorrect regarding the nonsubmission of sample switched access bills by Bell Atlantic and Chillicothe. While it is true that Bell Atlantic failed to submit such a sample bill with its December 1, 1988, filing, Bell Atlantic remedied this situation by attaching a sample to its reply.[30] In addition, Chillicothe is exempt from the *October Order* because its tariff calls for the use of single billing.[31]

B. *Alleged Faults in Submitted Sample Bills*

16. As an initial matter, AT&T's claims about alleged faults in sample special access bills are irrelevant since the *October Order* did not require LECs to file such sample bills.

17. There are, however, five LECs which AT&T alleges have submitted deficient sample switched access bills. The first is ALLTEL Illinois, which supposedly submitted a sample bill omitting the two billing reference categories. As discussed above, ALLTEL Illinois admits that its bill may not have been clear in presenting this information, and attached to its reply an ALLTEL Arkansas sample bill as representative of the format used in Illinois. We believe that the ALLTEL Arkansas bill is acceptable as a sample, if indeed it represents the format used for all ALLTEL bills. We must, however, examine an ALLTEL Illinois sample bill which follows the ALLTEL Arkansas format to make certain that it is representative. Hence, while we will not reject ALLTEL Illinois' tariff transmittal for this reason, we do require that ALLTEL Illinois submit to the Bureau an ALLTEL Illinois sample bill to insure that the bill follows the ALLTEL Arkansas format.

18. The second LEC filing identified by AT&T, the NYNEX filing, poses a more significant problem. NYNEX admits having failed to include the two billing reference categories, as well as the two initial billing company billing date categories, in its sample bill, and states that it cannot comply with the *October Order* requirements until August 1989. NYNEX neglected, however, to file a request that the requirements of the *October Order* be waived.

19. The failure of NYNEX to comply with the requirements of the *October Order*, coupled with its failure to seek any waiver of those requirements, is a serious matter of concern. Given the long history of this meet point billing proceeding, it is surprising, at this late date, to find a carrier maintaining that it still does not have the wherewithal to comply with our requirements within the ample time periods we have established. We are perplexed by the notion advanced by NYNEX that it needs a full 10 months to bring itself into compliance with the *October*

Order. We find it difficult to conceive why NYNEX is unable to allocate and utilize its resources in such a way as to avoid its present disregard for a Commission Order.

20. As a result of our concerns, we conclude that NYNEX must show cause why it has failed to comply with the requirements established in the *October Order* within the deadlines established in that Order.

21. According to AT&T, Nevada and Pacific Bell both failed to include the two initial billing company billing date categories in their respective sample bills. Nevada and Pacific Bell demonstrate in their replies that their bills, while not labelled as AT&T desired, do contain the information said to be missing. Thus, we conclude that their tariff revisions may become effective.

22. Finally, Rochester is said to have omitted the initial billing company billing date information from its sample bill. In its reply, Rochester admits that this is true, but attaches a sample bill which it began using on January 1, 1989. This sample bill provides the information with which AT&T is concerned. Therefore, we will allow Rochester's tariff revisions to become effective.

V. CONCLUSION; ORDERING CLAUSES

23. All of the proposed tariff revisions challenged by AT&T will be allowed to take effect on March 1, 1989. We are therefore concluding this phase of the Meet Point Billing docket after protracted proceedings occasioned by continual delays by the affected LECs.[32] We again remind the carriers, first, that the Commission has a stated preference for the single billing option and expects LECs to abide by that preference unless they can claim one of the exemptions listed in the *October Order*, and second, that unless a carrier has been granted a waiver after such waiver has been properly requested, the carrier is obligated to comply fully with the Commission's rules, regulations, and Orders.

24. IT IS THEREFORE ORDERED that the petition to reject filed by American Telephone and Telegraph Company, in response to the tariff revisions filed by the local exchange carriers listed in the Appendix of this Order, IS DENIED.

25. IT IS FURTHER ORDERED that ALLTEL Illinois, Inc., must file a copy of an ALLTEL Illinois sample switched access bill which follows the format of the ALLTEL Arkansas bill submitted with its reply in this proceeding. Pursuant to Section 408 of the Communications Act of 1934, 47 U.S.C. § 408, that sample bill must be filed with the Commmon Carrier Bureau not later than 30 days after the release of this Order.

26. IT IS FURTHER ORDERED that pursuant to Section 408 of the Communications Act of 1934, 47 U.S.C. § 408, and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701, the NYNEX Companies must show cause not later than 30 days after the release of this Order, why they did not comply with the requirements of the *October Order* by the deadlines established in that Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX

The following LECs and their tariff revisions were petitioned against by AT&T:

ALLTEL Illinois, Inc. (ALLTEL Illinois), Tariff F.C.C. No. 1, Transmittal No. 32

Bell Atlantic Telephone Companies (Bell Atlantic), Teriff F.C.C. No. 1, Transmittal No. 281

Centel Telephone Companies (Centel), Tariff F.C.C. No. 1, Transmittal No. 95

Chillicothe Telephone Company (Chillicothe), Tariff F.C.C. No. 1, Transmittal No. 14

Contel Telephone Companies (Contel), Tariff F.C.C. No. 1, Transmittal No. 8

Great Plains Communications, Inc. (Great Plains), Tariff F.C.C. No. 3, Transmittal No. 33

GTE Telephone Operating Companies (GTOC), Tariff F.C.C. No. 1, Transmittal No. 471

Illinois Consolidated Telephone Company (Illinois Consolidated), Tariff F.C.C. No. 2, Transmittal No. 30

Lincoln Telephone and Telegraph Company (Lincoln), Tariff F.C.C. No. 3, Transmittal No. 30

Nevada Bell (Nevada Bell), Tariff F.C.C. No. 1, Transmittal No. 72

New England Telephone and Telegraph Company (NET), Tariff F.C.C. No. 40, Transmittal No. 957

New York Telephone Company (NYT), Tariff F.C.C. No. 43, Transmittal No. 945

Pacific Bell (Pacific Bell), Tariff F.C.C. No. 128, Transmittal No. 1384

Rochester Telephone Corporation (Rochester), Tariff F.C.C. No. 1, Transmittal No. 98

Telephone Utilities Exchange Carrier Association (TUECA), Tariff F.C.C. No. 1, Transmittal No. 80

Walnut Hill Telephone Company (Walnut Hill), Tariff F.C.C. No. 1, Transmittal No. 35

FOOTNOTES

[1] The 16 LECs and their individual tariff transmittals are listed in the Appendix to this Order.

[2] Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Phase II, DA 88-1544, released Oct. 4, 1988 (*October Order*).

[3] The 12 LECs filing replies are ALLTEL Illinois, Inc., Bell Atlantic Telephone Company, Central Telephone Companies, Chillicothe Telephone Company, GTE Telephone Operating Companies, Nevada Bell, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), Pacific Bell, Rochester Telephone Corporation, Telephone Utilities Exchange Carrier Association, and Walnut Hill Telephone Company.

[4] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176-77 (1984).

[5] *See* Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, 2 FCC Rcd 4518 (1987) (*July 1987 Order*).

[6] *Id.* at 4519.

[7] *Id.*

[8] *See* note 2, *supra*. The *October Order* resulted from an investigation initiated by the Bureau in Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Order Designating Issues for Investigation, 3 FCC Rcd 3568 (1988) (*Designation Order*).

[9] *October Order* at para. 95.

[10] *Id.* at para. 96.

[11] AT&T Petition at 3.

[12] *Id.* at 3-4.

[13] *Id.* at 4-5.

[14] Bell Atlantic Reply at 2.

[15] *Id.* at 2-3, Appendix.

[16] Chillicothe Reply at 2.

[17] GTOC Reply at 3-5; Nevada Bell Reply at 2; NYNEX Reply at 2-3; Pacific Bell Reply at 2; TUECA Reply at 2.

[18] *See, e.g.*, Rochester Petition at 2. The OBF Report on meet point special access is not due until April 3, 1989.

[19] AT&T Petition at 3-4.

[20] Walnut Hill Reply at 1-2.

[21] ALLTEL Illinois Reply at Appendix.

[22] *Id.*

[23] NYNEX Reply at 2.

[24] *Id.*

[25] Nevada Bell and Pacific Bell Replies at 1-2.

[26] Rochester Reply at 3.

[27] AT&T Petition at 4.

[28] *See* note 18, *supra*.

[29] *October Order* at para. 72.

[30] Bell Atlantic Reply at Appendix.

[31] *See* Chillicothe Access Tariff at Section 2.4.7.

[32] The remaining two phases in this proceeding pertain to two remaining meet point billing issues: Feature Group A (FGA) and Feature Group B (FGB) services; and special access services. The *October Order* requested that OBF file two reports addressing these issues. *October Order* at para. 72. The first report, on FGA and FGB services, was filed on December 8, 1988, and the Bureau is currently reviewing the comments that were filed in response. *See* Ordering and Billing Forum of the Exchange Carrier Standards Association, Inc., Files Report on Meet Point Billing, Public Notice, DA 89-30, released Jan. 13, 1989. The OBF report on special access services is due April 3, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 28, 1989

LOCAL EXCHANGE CARRIER ACCESS TARIFF RATE LEVELS

Pleading Cycle Established for Applications for Review

On December 30, 1988, the Common Carrier Bureau released a Memorandum Opinion and Order (Local Exchange Carrier Access Tariff Rate Levels, CC Docket No. 88-554) addressing the responses of several local exchange carriers (LECs) to a previous *Order To Show Cause* in that docket, DA 88-1869, released Dec. 2, 1988. The *Order To Show Cause* noted that the Commission had extended the annual 1988 access rates through the first quarter of 1989, that recently available data for the first six months of 1988 indicated rates of return for many LECs in excess of the maximum allowable 12.0 percent, and that most of these LECs had not filed any rate reductions for the first quarter of 1989. Accordingly, the *Order To Show Cause* directed the 24 LECs with overall rates of return in excess of 12.25 percent either to retarget their overall rates to the allowable maximum or to show cause why they should not be ordered to do so.

Four of the respondent LECs elected to show cause and the rest filed rate reductions. No party filed any comments or oppositions to the four answers of the LECs electing to show cause. American Telephone and Telegraph Company (AT&T), however, filed a petition to investigate, first, the rate reductions of the NYNEX companies because not all of their rates were retargeted within the maximum when the categories of switched traffic sensitive and special access are considered separately, and second, the rate reductions of Bell Atlantic because it had not submitted adequate cost support.

The *December 30 Order* concluded that the four show cause answers were adequate, that AT&T's petition should be denied except as to its claim that Bell Atlantic failed to provide adequate cost support, that another LEC, Bourbeuse Telephone Company, likewise failed to provide adequate cost support, and that all the other rate reductions were sufficient. The *December 30 Order* suspended for one day the tariff revisions of Bell Atlantic and Bourbeuse and imposed accounting orders on them.

The *December 30 Order* was duly adopted on December 30, 1988, and copies were made available on that day at the press distribution office of the Commission. Due to technical difficulties, however, the normal distribution process through the Dockets Branch was not completed. Both Bell Atlantic and Bourbeuse Telephone Company were, however, notified on the day the Order was released.

The release of the *December 30 Order* has created some confusion as to the due date for applications for review of that Order. Accordingly, the Common Carrier Bureau has determined that, in this unique instance, the date of this Public Notice shall constitute the release date of the *December 30 Order* for the sole purpose of computing the due date for applications for review. Such applications must be filed no later than March 30, 1989. Copies of the *December 30 Order* may be obtained from the Tariff Division, Room 518, 1919 M Street N.W., Washington, D.C. 20554.

For further information, contact Gerald Chakerian, Tariff Division, (202) 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-47

In the Matter of

Amendment of Section 73.202(b),	RM-6588
Table of Allotments,	RM-6591
FM Broadcast Stations.	
(La Grange and Greenville, Georgia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 8, 1989

By the Chief, Allocations Branch:

1. The Commission has before it two mutually exclusive petitions for rule making. L. Lynn Henley (Henley) requests the allotment of Channel 239A to La Grange, Georgia, as the community's second local FM service and Orchon Broadcasting Company (Orchon) requests the allotment of Channel 239A to Greenville, Georgia, as its first local FM service. Henley and Orchon each state an intention to apply for the channel, if allotted to their respective communities. The Commission's Rules require a 105 kilometer separation between co-channel Class A allotments. However, La Grange and Greenville are located only approximately 30 kilometers apart, thus making the two proposals mutually exclusive.

2. Henley states that La Grange, the seat of Troup County, has a 1980 U.S. Census population of 24,204 persons. Orchon states that Greenville, the seat of Meriwether County, has a 1980 U.S. Census population of 1,213 persons. Channel 239A can be allotted to La Grange in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 239A can be allotted to Greenville in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.9 kilometers (7.4 miles) south to avoid a short-spacing to Station WKLS, Channel 241C, Atlanta, Georgia.[1]

3. We believe the public interest would be served by providing both petitioners with an opportunity to demonstrate in comments why its community should receive the allotment. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
	Option I	
La Grange, Georgia	281C1	239A, 281C1
	Option II	
Greenville, Georgia	--	239A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 1, 1989,** and reply comments on or before **May 16, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Larry G. Fuss
Contemporary
Communications
P.O. Box 4010
Opelika, Alabama 36803
(Consultant to Henley)

L. Lynn Henley
1406 Rocky Brook Road
Opelika, Alabama 36801
(Petitioner for La Grange)

Robert S. Stone, Esq.
McCampbell & Young
2021 Plaza Tower
P.O. Box 550
Knoxville, Tennessee
37901-0550
(Counsel to Orchon)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment

which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for La Grange are North Latitude 33-01-54 and West Longitude 85-01-48. The coordinates for Greenville are North Latitude 32-55-45 and West Longitude 84-45-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-184

In the Matter of

Amendment of Section 73.202(b), RM-6116
Table of Allotments,
FM Broadcast Stations.
(Coalinga, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 14, 1989; Released: March 8, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 2567 (1988), issued in response to a petition filed by William L. Zawila (petitioner), permittee of Station KNGS(FM), Channel 261A, Coalinga, California, proposing the substitution of Channel 261B1 for Channel 261A and modification of his permit accordingly. Petitioner filed comments and a counterproposal[1] in response to the *Notice*. Additionally, petitioner submitted reply comments. No other comments were received.

2. The counterproposal filed by petitioner requests the substitution of Channel 261B for Channel 261A, in lieu of his initial request, and modification of the permit for Station KNGS(FM) to specify operation on the higher powered channel. Petitioner states that the proposed use of Channel 261B from a transmitter site 31.0 kilometers (19.2 miles) southeast[2] of the community would enable him to provide 60 dBu coverage to a "white" area consisting of over 25,000 persons. [3] Additionally, petitioner advises that the proposal would provide a first expanded coverage FM station to Coalinga.

3. In reply comments, petitioner requested a change in the allotment reference point coordinates for Channel 262A at Orange Cove, California, allotted in MM Docket No. 84-231, to avoid a short-spacing to his modified proposal. During the window period for the allotment, one application was filed (BPH-880629MD). Petitioner's modified proposal requires a minimum distance separation of 105 kilometers to Channel 262A at Orange Cove, whereas the distance to the coordinates specified in the pending application for Channel 262A at Orange Cove (36-44-45 and 119-16-58), is 107.4 kilometers. Thus, the reply comments have been rendered moot and no further discussion of them is required.

4. In consideration of the above, we believe the public interest would benefit by substituting Channel 261B for Channel 261A at Coalinga, California, since it could provide the community with its first expanded coverage area broadcast station. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Station KNGS(FM) to specify operation on Channel 261B in lieu of Channel 261A, as requested. A staff engineering analysis confirms that Channel 261B can be allotted to Coalinga at the petitioner's preferred transmitter site[4] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 24, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Coalinga, California	261B

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of William L. Zawila for Station KNGS(FM), IS MODIFIED effective **April 24, 1989,** to specify operation on Channel 261B in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given August 11, 1988, Report No. 1743.

[2] Reference coordinates at the petitioner's specified site are 36-00-21 and 120-03-17. These coordinates differ from those given in the *Notice* since the earlier site was based on the initial request for Channel 261B1 at the transmitter site specified in petitioner's construction permit for Channel 261A.

[3] Petitioner advises that his figures are based on projected coverage as well as population estimates from the U.S. Census Bureau.

[4] Use of petitioner's specified site also meets the required 169 kilometer minimum distance separation requirement to the construction permit issued for proposed Station KAJB(FM), Channel 260B, Mount Bullion, CA, at coordinates 37-32-00 and 120-01-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-54

In the Matter of

Amendment of Section 73.202(b), RM-6634
Table of Allotments,
FM Broadcast Stations.
(Derby, Augusta and
Herington, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 8, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed by New West Radio, Inc. (petitioner), requesting the substitution of FM Channel 242C2 for Channel 240A at Derby, Kansas. Petitioner also requests modification of its license for Station KRZZ-FM, to specify operation on the higher class channel.

2. Channel 242C2 can be allotted to Derby, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[1] To accommodate the new channel at Derby, it would be necessary to delete Channel 242A at Augusta, Kansas, and Herington, Kansas. Channel 242A was allotted to Augusta and Herington in MM Docket 84-231 and made available for application in Window No. 78 (opened June 17, 1988, and closed July 28, 1988). One application is on file for the channel at Herington,[2] and four applications are pending for the channel at Augusta.[3] Petitioner has proposed the substitution of Channel 289A for Channel 242A at Herington and Channel 283A for Channel 242A at Augusta. The proposed substitution of Channel 289A at Herington can be accomplished in compliance with the minimum distance separation requirements at the applicant's site for Channel 242A.[4] Channel 283A can be allotted to Augusta in compliance with the spacing requirements at each applicant's specified site for Channel 242A.[5] The applicants for Channel 242A at Herington and the four applicants for Channel 242A at Augusta would be permitted to specify the new Class A channel and retain their cut off protection, since the channels are equivalent.

3. As for the requested upgrade at Derby, we shall propose to modify the license of Station KRZZ-FM, to specify operation on Channel 242C2, in accordance with Section 1.420(g) of the Commission's Rules.

4. In order to provide a wide coverage area station for the Derby, Kansas area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Derby, Kansas	240A	242C2
Augusta, Kansas	242A	283A
Herington, Kansas	242A	289A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 1, 1989,** and reply comments on or before **May 16, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David Tillotson
Robert S. Koppel
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(Counsel for New West Radio, Inc.)

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Order to the following:

Marie Willis and
Donald D. Willis
115 North 8th Street
Herington, Kansas 67449
(880712ML)

Curtis R. McClinton, Jr.
10224 Locust Street
Kansas City, Missouri 64131
(880728NI)

Gregory Ray Steckline
Route 1, Box 94A
Garden Plains, Kansas 67050
(880727MO)

Jeannine T. Rainbolt
2202 North Minnesota Ave.
Shawnee, Oklahoma 74801
(880728MV)

Douglas D. Law
53 Huntington
Augusta, Kansas 67010
(880729MB)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 242C2 at Derby are 37-37-03 and 97-20-11.

[2] 880712ML.

[3] 880727MO, 880729MB, 880728NI and 880728MV.

[4] 38-38-17 and 96-57-46.

[5] 37-39-56 and 97-02-12, 37-38-46 and 96-59-01, 37-43-21 and 97-03-55, 37-42-00 and 97-02-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-55

In the Matter of

Amendment of Section 73.202(b), RM-6593
Table of Allotments,
FM Broadcast Stations.
(Warner Robbins, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 8, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Donald W. Earnhart (petitioner), requesting the allotment of Channel 273A to Warner Robbins, Georgia, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 273A can be allotted to Warner Robbins in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.5 kilometers (2.2 miles) south to avoid a short-spacing to Station WKZR, Channel 272A, Milledgeville, Georgia.

2. We believe the public interest would be served by proposing the allotment of Channel 273A to Warner Robbins, Georgia, since an interest has been expressed in providing the community with an additional local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Warner Robbins, Georgia	269A	269A, 273A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **May 1, 1989,** and reply comments on or before **May 16, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald W. Earnhart
P.O. Box 3878
Jackson, GA 30233
(Petitioner)

Larry G. Fuss
P.O. Box 4010
Opelika, AL 36803
(Consultant to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 32-35-44 and West Longitude 83-37-00

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-56

In the Matter of

Amendment of Section 73.202(b),	RM-6589
Table of Allotments,	
FM Broadcast Stations.	
(Zebulon and Montezuma, Georgia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 8, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hogan Broadcasting System (petitioner) requesting the allotment of Channel 223A to Zebulon, Georgia, as the community's first local FM service. In order to allot Channel 223A to Zebulon in compliance with the Commission's minimum distance separation requirements, petitioner also requests the substitution of Channel 236A for Channel 223A at Montezuma, Georgia, which is unoccupied but for which an application is pending.[1] Petitioner states that it will apply for Channel 223A, if allotted to Zebulon.

2. Channel 223A can be allotted to Zebulon in compliance with the Commission's minimum distance separtion requirements with a site restriction of 1.1 kilometers (0.7 miles) south to avoid a short-spacing to Station WZGC, Channel 225C1, Atlanta, Georgia. Channel 236A can be allotted to Montezuma in compliance with the Commission's minimum distance separation requirements and can be used at reference coordinates of the allotment and the site specified in the pending application of Macon County Broadcasting Co. (ARN-871123MC).[2]

3. We believe the public interest would be served by proposing the allotment of Channel 223A to Zebulon, Georgia, and the substitution of Channel 236A for Channel 223A at Montezuma, Georgia, since an interest has been expressed in providing Zebulon with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Montezuma, Georgia	223A	236A
Zebulon, Georgia	--	223A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 1, 1989,** and reply comments on or before **May 16, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Billy G. Hogan, President
Hogan Broadcasting System
Rt. 1, Box 183
Elkmont, Alabama 35620
(Petitioner)

6. IT IS ORDERED, That the Secretary SHALL SEND a copy of this *Notice of Proposed Rule Making,* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 223A at Montezuma, Georgia, as follows: Macon County Broadcasting Co., P.O. Box 511, Montezuma, Georgia 31063.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 223A was allotted to Montezuma in the omnibus FM rule making proceeding, MM Docket 84-231, and the window for filing applications closed on November 24, 1987. The Commission has stated that Docket 84-231 channels can be substituted, after the filing window had closed, provided the substitute channel complies with the spacing requirements to each of the sites specified in the pending applications. *See, Memorandum Opinion and Order,* 51 FR 36401, October 10, 1986.

[2] The coordinates for Channel 223A at Zebulon are North Latitude 33-05-36 and West Longitude 84-20-34. The coordinates for the Channel 236A application at Montezuma are North Latitude 32-17-58 and West Longitude 84-01-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-93

In the Matter of

Amendment of Section 73.202(b), RM-5632
Table of Allotments,
FM Broadcast Stations.
(Montour Falls, New York)

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: February 15, 1989; Released: March 8, 1989

By the Chief, Allocations Branch:

1. At the request of Twin Tiers Communications Corp. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 2246 (1987), proposing the substitution of Channel 258A for Channel 285A at Montour Falls, New York, and the modification of its license for Station WNGZ-FM to specify operation on the substituted channel. The petitioner filed late comments.[1] No other comments were received.

2. Petitioner requests the substitution of channels in order to eliminate interference caused by Station WNGZ-FM being short-spaced to Stations WKPQ, Channel 287B, Hornell, New York (actual spacing of 65.6 kilometers vs. 69 kilometers required), WOIV, Channel 286, Deruyter, New York (actual spacing of 103.9 kilometers vs. 105 kilomters required), and to unused and unapplied for Channel 285B at Port Colborne, Ontario, Canada (actual spacing of 105.5 kilometers vs. 206 kilometers required). Based on our engineering review, the *Notice* stated that the substitution of channels, while eliminating the short-spacings, would result in only marginal improvement since Station WNGZ-FM would now be closely spaced to co-channel Class B Station WDCX at Buffalo, New York (162.9 kilometers vs. 163 required) and to Station WOKW, Channel 260B, Cortland, New York (68.6 kilometers vs. 69 required). In addition, we stated that the allocation of Channel 258A at Montour Falls would require a site restriction of at least 12.81 kilometers (7.96 miles) south in order to avoid short-spacings to Station WDCX at Buffalo and Station WOKW at Cortland. Since this distance is too far to assume city-grade coverage, petitioner was requested to submit a study showing that Station WNGZ-FM could provide the required 70 dBu signal to all of Montour Falls from a site meeting the minimum mileage separation requirements.

3. In response, petitioner reaffirmed its interest in Channel 258A. It also submitted a city-grade coverage study based on the assumption of uniform terrain from a site 12.6 kilometers south of Montour Falls.[2] While use of this site would comply with the Commission's minimum distance separation requirements, it would not provide the required 70 dBu signal to all of Montour Falls. Rather, the study shows that a station on Channel 258A would provide city-grade service to only 81% of the community. Petitioner acknowledges this deficiency but states that the area not receiving city-grade service consists mainly of uninhabited swamp land or is in an area which is closed during the winter months and not conducive to summer use. Petitioner, however, submits a study showing that Channel 258A will provide a city-grade signal to all of Montour Falls based on the actual terrain between the transmitter site and the community. Therefore, it requests that we waive the 100% coverage requirement.

4. Section 73.315 of the Commission's Rules requires that a transmitter be so located as to place a minimum field strength of 70 dBu, or 3.16 uV/m, over the entire principal community to be served. Generally, rule making proponents are required to show compliance with Section 73.315 based on an assumption of uniform rather than actual terrain. However, in *Broadway and Woodstock, Virginia*, 2 FCC Rcd 7067 (1987), the Commission found that a limited exception to this policy was warranted. In that case, Ruarch Associates, licensee of Station WAZR, Channel 240A, Woodstock, Virginia, filed a petition for rule making seeking the substitution of Channel 241B1 for its Class A channel and the modification of its license accordingly. The petition was returned as unacceptable based on a finding that the necessary site restriction was too far from the center of the city to assume compliance with Section 73.315 of the Commission's Rules, based on uniform terrain. In response to Ruarch Associates' Application for Review, the Commission found that a relaxation of the Commission's policy was warranted based on the following circumstances: (1) the new channel would not be available for competing applications; (2) the petitioner had provided substantial evidence showing that the proposed facilities would comply with our principal city coverage requirement using our standard prediction method but relaxing the normal assumption of uniform terrain; (3) the petitioner had secured the proposed site owner's assurance that the land would be available; (4) the petitioner had obtained FAA approval for a tower at the proposed site; and (5) the petitioner had submitted sufficient information to allow the Commission to confirm the height above average terrain (HAAT) of an antenna located at the proposed site.

5. Our engineering review has confirmed that Station WNGZ-FM, operating on Channel 258A at Montour Falls, at the coordinates proposed by the petitioner, would provide city-grade coverage to the entire community, if actual, rather than uniform terrain, is assumed. Thus, it is our preliminary finding that petitioner's request may be grantable. Therefore, based on the *Woodstock and Broadway, Virginia*, decision, *supra*, we request that petitioner furnish the Commission with additional information showing that it has reasonable assurances that the transmitter site it proposes to utilize is available to it and that the necessary FAA approval can be obtained.

6. Based on the above discussion, we believe the public interest would be served by providing the petitioner with any opportunity to furnish the information requested above. No counterproposals to this allotment will be accepted since an opportunity for the filing of such proposals has already been provided.

7. Interested parties may file comments on or before **May 1, 1989,** and reply comments on or before **May 16, 1989,** and are advised to read the Appendix to the original

Notice in this proceeding for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas A. Haight
Station WNGZ-FM
421 North Franklin Street
Watkins Glen, New York 14891
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's late-filed comments were not accompanied by a request for their acceptance. However, in light of the fact that this proposal is uncontested, we believe that the public interest would be served by their acceptance and consideration.

[2] The coordinates specified by the petitioner are North Latitude 42-14-15 and West Longitude 76-52-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-156

In the Matter of

Amendment of Section 73.202(b),	RM-4938
Table of Allotments,	RM-5403
FM Broadcast Stations.	RM-5808
(Claremore, Locust Grove and Nowata, Oklahoma and Barling, Arkansas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 17, 1989; Released: March 6, 1989

By the Commission:

1. The Commission has before it an Application for Review filed by KXOJ, Inc. (KXOJ) and a Petition for Reconsideration and Clarification filed by Fred Weinberg,(Weinberg) both directed against the *Memorandum Opinion and Order* in this proceeding, 3 FCC Rcd 4037 (Mass Media Bureau 1988).[1] William R. Williams, Trustee in Bankruptcy (Williams) and Moran Broadcasting Company (Moran) filed a joint Opposition to Application for Review. The *Memorandum Opinion and Order* allotted Channel 264A to Claremore, Oklahoma, and Channel 233A to Locust Grove, Oklahoma. We will deny both the Application for Review and the Petition for Reconsideration and Clarification.

BACKGROUND

2. This proceeding commenced with the filing of a petition for rule making by Mike Warren proposing the allotment of Channel 264A to Claremore, Oklahoma. In the *Notice of Proposed Rule Making* in this proceeding, 50 Fed. Reg. 23729, published June 5, 1985, the Mass Media Bureau proposed the allotment of Channel 264A to Claremore. In a counterproposal, KXOJ, licensee of Station KXOJ, Channel 265A, Sapulpa, Oklahoma, proposed the allotment of Channel 264A to Locust Grove, Oklahoma, and Channel 233A to Claremore, Oklahoma. In response to the *Further Notice of Proposed Rule Making* in this proceeding, 52 Fed. Reg. 18933, published May 20, 1987, Teresa Brown, permittee of Station KPHN, Channel 233A, Barling, Arkansas, filed a counterproposal proposing the substitution of Channel 233C2 in lieu of Channel 233A at Barling and modification of her construction permit to specify operation on Channel 233C2.

3. The *Report and Order* in this proceeding, released September 30, 1987, allotted Channel 233A to Claremore, Oklahoma, Channel 264A to Locust Grove, Oklahoma, and Channel 233C2 to Barling, Arkansas. *See* 2 FCC Rcd 5921 (Mass Media Bureau 1987). The *Report and Order* also modified the construction permit of Station KPHN to specify operation on Channel 233C2. In order to allot Channel 233A to Claremore, it was necessary for nearby Station KNFB, Channel 232A, Nowata, Oklahoma to relocate its transmitter site. To this end, KXOJ and Special Services Radio, Inc., at that time licensee of Station KNFB, had entered into an April 2, 1986 agreement looking toward relocation of the Station KNFB transmitter site. Subsequently, Special Services Radio, Inc. filed for bankruptcy and the Station KNFB license was assigned to Williams. Pursuant to the agreement, Williams filed an application to relocate the Station KNFB transmitter site (File No. BMPH-870213IB). The *Report and Order* specifically noted that the proposed Station KNFB transmitter relocation removed a short-spacing which would otherwise exist with the Channel 233A allotment at Claremore.

4. On August 31, 1987, Williams filed an application to assign the Station KNFB license to Moran. Thereafter, on October 29, 1987, Williams and Moran filed a joint Petition for Reconsideration directed against the *Report and Order* and the Channel 233A allotment at Claremore. In their Petition for Reconsideration, Williams and Moran referred to an agreement which involved relocation of the Station KNFB transmitter in exchange for payment of15,000. That agreement specifically provided that KXOJ would locate a new transmitter site that would "maximize KNFB(FM)'s ability to cover Bartlesville, Oklahoma with a reliable signal of the highest intensity possible." According to the Petition for Reconsideration, Williams, as Trustee in Bankruptcy for Station KNFB, relied on the representation by KXOJ with respect to the proposed site, and thereafter filed an application for the transmitter relocation contemplated by the agreement. Williams also supported the Channel 233A allotment at Claremore advanced by KXOJ. Subsequently, Williams recognized that the proposed site would reduce service into Bartlesville and thereby diminish the value of the bankruptcy estate. Williams therefore amended the KNFB transmitter site relocation application filed pursuant to the agreement to specify a site near the licensed Station KNFB site. Inasmuch as the licensed Station KNFB site and the site specified in the pending amended application would require a short-spacing of approximately 10.4 kilometers with the Channel 233A allotment at Claremore, Williams and Moran asserted that the Claremore allotment was defective and should be deleted.

5. In the *Memorandum Opinion and Order*, the staff granted the Petition for Reconsideration by substituting Channel 264A in lieu of Channel 233A at Claremore and Channel 233A in lieu of Channel 264A at Locust Grove. Both of these allotments required site restrictions. In addition, these substitutions permitted the upgrade at Barling, Arkansas, from Channel 233A to Channel 233C2, with a site restriction, and removed the conflict between KNFB's application and the allotment at Claremore. The staff stated that it would not direct Moran Broadcasting Company or the Trustee in Bankruptcy to involuntarily relocate the Station KNFB transmitter to a site that would accommodate Channel 233A at Claremore. In making these determinations the staff noted that it was able to achieve the public interest goals of first local services to Claremore and Locust Grove and an upgraded service at Barling while adhering to the Commission policy of not requiring a station to involuntarily relocate its transmitter site. In this regard, the staff also noted that requiring Station KNFB to relocate its transmitter would, in effect,

be determining the validity of the site relocation agreement and adjudicating the rights of the respective parties under the laws of Oklahoma.

APPLICATION FOR REVIEW

6. In its Application for Review, KXOJ contends that the fact Williams changed his mind with respect to the KNFB transmitter relocation was not a sufficient basis to grant the Petition for Reconsideration directed against the *Report and Order*. KXOJ contends that the reason Williams chose not to go forward with the transmitter relocation could have been ascertained prior to the *Report and Order*. In addition, KXOJ argues that the Commission policy of not requiring a station to involuntarily relocate its transmitter site should be changed "to avoid a grave injustice and to prevent abuse of the Commission's process" under the present circumstances. In this vein, KXOJ argues that compelling Station KNFB to relocate its transmitter site would not be tantamount to enforcing a private agreement. Rather, KXOJ contends, we would be merely requiring Station KNFB to fulfill its commitment to the Commission. Finally, KXOJ refers to the costs and delay in requiring the seven applicants for the Claremore and Locust Grove allotments to amend their pending applications.

PETITION FOR RECONSIDERATION AND CLARIFICATION

7. Fred Weinberg is one of the four applicants for the Claremore allotment. In his petition, he contends that the Commission policy of not requiring a station to involuntarily relocate a transmitter site should not be applicable in this situation because Williams participated in the rule making proceeding by supporting a Channel 233A allotment to Claremore. Weinberg also notes that Williams could have ascertained the effect of the KNFB transmitter relocation before the *Report and Order*. In a separate vein, Weinberg refers to the "hardship" of requiring the seven applicants for Claremore and Locust Grove to amend their applications to specify the new channel and new transmitter sites. Finally, Weinberg contends that the original allotment of Channel 233A to Claremore and Channel 264A to Locust Grove are "more efficient" in that these allotments would enable the eventual licensees to serve densely populated areas they will not be able to serve under the staff's revised allotment scheme. Because a larger population will be served, Weinberg believes the staff's action should be reversed.

DISCUSSION

8. After careful consideration of this matter, we will not set aside the staff action. We concur with KXOJ and Weinberg that the reason not to go forward with the transmitter relocation as provided in the original agreement entered into by the licensee of Station KNFB could have been ascertained by Williams well before the *Report and Order* in this proceeding. However, the fact remains that in the absence of an adequate transmitter relocation by Station KNFB, a Channel 233A allotment at Claremore would still be short-spaced to the licensed site of Station KNFB as well as the site now proposed in the application to relocate the KNFB transmitter. We would not have allotted Channel 233A to Claremore absent such relocation. The *Report and Order* was premised on the KNFB transmitter site relocation. Reconsideration of the original action was not inappropriate given the overriding public interest objective of maintaining compliance with the minimum spacing requirements. *Cf. Pacific Lutheran University, Inc.*, 37 FCC 2d 215 (1972).[2]

9. We also believe that the staff was justified in not requiring a station to involuntarily relocate its transmitter site. [3] Requiring Station KNFB to involuntarily relocate its transmitter site is a modification of Station KNFB's license under Section 316 of the Communications Act. An involuntary transmitter relocation would require the issuance of an Order to Show Cause directed against the licensee of Station KNFB and a possible subsequent hearing. We continue to believe that a Commission compelled transmitter site relocation requires an unusually strong and compelling showing that the public interest gains substantially outweigh the administrative difficulties as well as the ensuing impact upon the affected station and the public. *See Asheville, North Carolina, supra.* KXOJ and Weinberg have not made such a showing with respect to the necessity of allotting Channel 233A to Claremore. The staff's alternative allotment of Channel 264A to Claremore serves the public interest objective of a first local service to Claremore. Although that allotment may preclude a Claremore station from serving the populated area south of Claremore due to a site restriction, the ability to serve a greater population would not standing alone constitute a compelling reason to modify the Station KNFB license. This area receives a plethora of other broadcast services and the Claremore station will be able to discharge its principal service obligation to its community of license from the restricted site.

10. The respective hearing designation orders for the Claremore and Locust Grove allotments will require the seven applicants to amend their applications within 30 days of the release of those hearing designation orders.[4] In this regard, we recognize that amending these applications will involve an additional expense to the seven applicants. However, we note that at the time the applications were filed for the original Claremore and Locust Grove allotments, the Petition for Reconsideration filed by Williams and Moran directed against the *Report and Order* was pending.[5] As a consequence, the applicants were on notice that the particular allotments were subject to the Petition for Reconsideration and could be subsequently either deleted or an alternative channel substituted.

11. Both KXOJ and Weinberg disagree with the finding in the *Memorandum Opinion and Order* that requiring a Station KNFB transmitter relocation would be enforcing a private contractual agreement. Instead, they argue that we would be merely requiring Williams to honor his previous commitment to the Commission. The commitment by Williams to the Commission with respect to the Station KNFB transmitter relocation was predicated on the validity of the agreement. There is a disagreement among the parties in this proceeding as to whether KXOJ has fulfilled its obligations under the agreement, and whether KXOJ misled Williams as to a critical factual premise of the agreement. Were we to take into account the existence of the alleged agreement in determining whether to force KFNB to relocate its transmitter site, we would be enforcing both the agreement and commitment by Williams to relocate the Station KNFB transmitter site. This would require us to determine whether KXOJ has fulfilled its obligation under the agreement and adjudicate the rights

of the parties under relevant state laws. It is not necessary to do so in this instance because we are able to achieve the public interest goals of first local services to Claremore and Locust Grove without resort to the private agreement or requiring Station KNFB to involuntarily relocate its transmitter. However, our action in this proceeding does not preclude KXOJ, Weinberg, or any other party from pursuing such rights as it may have under contract law in a local forum.

12. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by KXOJ, Inc. and the Petition for Reconsideration and Clarification filed by Fred Weinberg ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] KXOJ, Inc. also filed a Petition for Stay and an Errata. Inasmuch as we are denying the Application for Review filed by KXOJ, Inc., the Petition for Stay is hereby dismissed.

[2] Section 1.429(b)(3) of the rules specifically permits Commission consideration of a petition for reconsideration if required by the public interest.

[3] *See Asheville, North Carolina*, 36 RR 2d 810 (1976).

[4] The *Memorandum Opinion and Order* afforded the seven applicants the opportunity to amend their applications without loss of cut-off protection. In his request to clarify the *Memorandum Opinion and Order*, Fred Weinberg notes that the *Memorandum Opinion and Order* did not set a deadline for these amendments. In this regard, Fred Weinberg requests that these amendments not be required until the Claremore and Locust Grove allotments are final. Inasmuch as we are denying the Application for Review and the Petition for Reconsideration and Clarification, it is now appropriate to require the amendments in connection with the hearing designation orders.

[5] The Petition for Reconsideration was filed on October 29, 1987. Public Notice was given on November 16, 1987. Report No. 1691. The applications for the Claremore and Locust Grove allotments were filed between November 19 and December 16, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-284

In the Matter of

Amendment of Section 73.202(b), RM-2573
Table of Allotments,
FM Broadcast Stations.
(Vero Beach, Florida)

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1989; Released: March 6, 1989

By the Commission:

1. The Commission has before it an Application for Review filed by Treasure Coast Media, Inc. (TC Media), licensee of FM Station WXCL, Channel 269A, Vero Beach, Florida, directed against the *Report and Order* in this proceeding, 3 FCC Rcd 1049 (Mass Media Bur. 1988). The *Report and Order* allotted Channel 279C2 and Channel 259C2 to Vero Beach and modified the license of Treasure Coast Radio, Inc. (TC Radio), for Station WAVW, Channel 288A, Vero Beach to specify operation on Channel 279C2. TC Radio filed an Opposition to Application for Review. TC Media filed a Reply and a Motion for Stay. For the reasons discussed below, we will deny the Application for Review.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by TC Radio, proposing the substitution of Channel 279C2 in lieu of Channel 288A at Vero Beach and modification of the Station WAVW license to specify operation on Channel 279C2. TC Radio made its request pursuant to Section 1.420(g) of the Commission's rules, which allows the modification of a station license to specify a different class of channel in the course of rule making proceedings to amend the FM Table of Allotments if there is no other expression of interest in the allotment. Section 1.420(g)(2) also allows such a modification, even if there is another expression of interest, if an additional equivalent class of channel is also allotted to accommodate the other interests. *See also Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984).

3. On July 3, 1986, the Mass Media Bureau released the *Notice of Proposed Rule Making* this proceeding.[1] In response to the *Notice*, the Bureau received five expressions of interest in a Class C2 facility at Vero Beach. WGYL Radio Corporation, former licensee of Station WGYL, Channel 228A, Vero Beach, and TC Media were among these five parties. These licensees requested that their existing Class A licenses be modified to specify operation on Channel 279C2.

4. In the course of the proceeding, an additional equivalent channel (Channel 259C2) at Vero Beach became available to accommodate the other expressions of interest. No allegations were made that this was not an "equivalent" channel within the meaning of Section 1.420(g)(2). In accordance with Section 1.420(g) of the Commission's Rules, the staff allotted Channel 279C2 to Vero Beach and modified the Station WAVW license to specify operation on Channel 279C2. Pursuant to the requirement contained in Section 1.420(g)(2) of the Rules, Channel 259C2 was allotted to Vero Beach to accommodate the other expressions of interest. The Channel 259C2 allotment required a site restriction of 22.5 kilometers (14 miles) north of Vero Beach.

APPLICATION FOR REVIEW

5. In its Application for Review, TC Media argues, for the first time in this proceeding, that Channel 259C2 is not an equivalent channel within the ambit of Section 1.420(g)(2) and *Modification of FM and TV Station Licenses, supra*. In support of this argument, TC Media refers to the limited area on which the Channel 259C2 transmitter tower could be erected and contends that due to environmental and FAA concerns, the eventual licensee of this allotment will not be able to operate with maximum Class C2 facilities. Specifically, TC Media contends that a station on Channel 259C2 must locate its tower in an "environmentally protected area," and, therefore, is prohibited. Similarly, TC Media also contends that a tower with an antenna radiation center of 150 meters above average terrain would constitute a hazard to air navigation and would not receive the required FAA approval. Thus, TC Media concludes that Channel 259C2 is not an equivalent channel and, therefore, we could not allot Channel 279C2 to Vero Beach and modify the Station WAVW license without allowing other parties to compete for Channel 279C2.

6. TC Media also argues that under the Supreme Court decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the Commission could not exclude Station WXCL from a comparative proceeding for the Channel 279C2 allotment.[2] TC Media notes that in response to the *Notice of Proposed Rule Making*, it not only expressed interest in the proposed Channel 279C2 allotment, but filed a counterproposal proposing the substitution of Channel 279C2 in lieu of its Channel 269A at Vero Beach and modification of its Station WXCL license to specify operation of Channel 279C2. Because this was a mutually exclusive proposal, TC Media asserts that it should have been afforded comparative consideration in this proceeding.

DISCUSSION

Channel Equivalency

7. As stated earlier, in order to allot Channel 279C2 to Vero Beach and modify the Station WAVW license without a comparative proceeding, it was necessary to allot an equivalent class of channel to Vero Beach. Based on the record in this proceeding, we believe the Channel 259C2 allotment to Vero Beach complied with this requirement. At earlier stages in this rule making proceeding, none of the commenting parties suggested that environmental concerns would preclude a Channel 259C2 allotment or that such an allotment could not gain FAA approval at maxi-

mum antenna height. In fact, TC Media, in its comments filed August 25, 1986, proposed Channel 259C2 as an "equivalent" channel for other expressions of interest, and suggested that TC Media and TC Radio "compete" for the upgrade to Channel 279C2. [3] In this rule making proceeding, the staff presumed that a station on Channel 259C2 could be constructed consistent with all environmental requirements and at the maximum antenna height of 150 meters in accordance with FAA approval. Both of these presumptions were rebuttable. *Cf. San Clemente, California*, 3 FCC Rcd 6728 (1988). If either of these issues had been raised previously in this proceeding, the staff would have made a determination concerning the reasonable likelihood that such a facility could be constructed consistent with environmental requirements and that the FAA would approve maximum antenna height. These newly raised matters will not, however, be considered by the Commission for the first time on review. 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115 (c). Moreover, had they been raised before the staff on reconsideration, reconsideration would not have been proper. 47 C.F.R. § 1.429(b).

8. In allotting an equivalent channel to Vero Beach to comply with Section 1.420(g)(2) of the Rules, we realize that no two channels are ever entirely identical. Therefore, our Rules only require, where an upgraded channel is requested and there are other expressions of interest, the allotment of another equivalent class of channel, in this case a Class C2 channel. As indicated, there is an equivalent channel available, Channel 259C2. In order to allot the additional channel in this case, the staff made two further subsidiary determinations. First, it found that Channel 259C2 at Vero Beach would comply with our minimum distance separation requirements, and would be protected, like Channel 279C2, as a Class C2 allotment. Second, even though it determined that this allotment would require a 22.5 kilometer site restriction, the staff also determined that the allotment would provide principal city coverage of Vero Beach. As stated in the previous paragraph, we will consider in a rule making proceeding other relevant factors which might undermine a finding of channel equivalency if, unlike here, they are timely raised. Included among these factors would be the availability of a site meeting applicable environmental requirements and permitting operation at maximum antenna height.

9. In the absence of comment at the appropriate time in the rule making proceeding on environmental consequences or air space hazards, we do not believe that it is appropriate, or would be feasible, for the Commission on its own to assess the environmental or air space consequences of all channel allotments in rule making proceedings. To do so would lead to inordinate delays in expanding services to the public, would be speculative for the most part (since specific sites would not be known), and would require a significant expenditure of resources by all concerned. Accordingly, there was no error by the staff in not considering these matters when they were not raised by any of the parties.

10. In regard to Channel 259C2 at Vero Beach, there are now 16 applications pending for this allotment. These applicants submitted environmental narratives with their applications and notified the FAA Southern Regional Office of their proposed tower constructions. Nine of these applicants have proposed the maximum Class C2 antenna height of 150 meters. It will be several months into the application process before our staff makes a determination with respect to the environmental narratives and the FAA makes a determination with respect to the proposed towers. We do not believe that either Section 1.420(g)(2) of the Rules or *Modification of FM and TV Station Licenses* will compel us to revisit the rule making allotment process at a later date if some of these applicants are ultimately required to modify their proposals due to environmental considerations or specify a lower antenna height due to FAA restrictions.[4]

ASHBACKER

11. We are also of the view that our action in this proceeding modifying the Station WAVW license to specify operation on Channel 279C2 did not violate any principle established in *Ashbacker Radio Corp. v. FCC, supra*. As stated earlier, *Ashbacker* stands for the proposition that the Commission can not award a license without granting a timely competing proposal the comparative consideration required by our own rules. *See also Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987). This, however, does not preclude the Commission from establishing eligibility standards that obviate the need for individual hearings before the denial of an application. *See U. S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). In full accord with both *Ashbacker* and *Storer Broadcasting, supra*, we established in *Modification of FM and TV Station Licenses* that only the petitioner for the new channel is eligible to apply for a station on the requested channel when there is either no interest in the proposed channel or, if an interest is expressed, an additional equivalent class of channel is made available for the community. Thus, in addition to being consistent with *Ashbacker*, this procedure achieves the public interest benefit of encouraging existing stations to upgrade their service to the public by rewarding their efforts to identify candidate channels for an upgrade. As long as we place an interested party in a comparative position as favorable as if it were allowed to compete for an upgraded channel first proposed by another party, *Ashbacker* is inapplicable. The upgrade procedure in Section 1.420(g)(2) specifies that an additional equivalent class of channel also be allotted to the community if another party expresses an interest in the proposed channel. The expression of interest may be in the form of either an interest in a new station or an upgrade of an existing facility. The fact that TC Media characterized its expression of interest in Channel 279C2 as a counterproposal proposing its own upgrade at Station WXCL did not negate the fact that TC Radio had first identified the candidate channel for its requested upgrade, and, therefore, was entitled under our rules to be the sole applicant for that channel.

12. Accordingly, IT IS ORDERED, That the aforementioned Application for Review and Motion for Stay filed by Treasure Coast Media, Inc., ARE DENIED.

13. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 51 Fed. Reg. 24873, published July 9, 1986.

[2] In *Ashbacker*, the Supreme Court held that "where two *bona fide* applications are mutually exclusive" the Commission may not grant one application without comparative consideration with a conflicting and acceptable proposal.

[3] Not until after the *Report and Order* rejected its request that TC Media and TC Radio compete for the Channel 279C2 allotment did TC Media argue that Channel 259C2 is not, in fact, equivalent. Now TC Media in its Application for Review includes letters from an airspace consultant indicating that a 150 meter tower would not receive FAA approval and from a technical consultant referring to a potential air hazard and environmental concerns.

[4] Section 73.211(a) of the Rules does not require a minimum antenna height for a Class C2 allotment. We also note that any FAA restriction imposed during the application process does not preclude the eventual licensee from subsequently obtaining a greater antenna height at either its present or a new site by filing the appropriate application. We routinely process such minor change construction permit applications proposing a change in antenna height and/or transmitter site.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-48

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Gray, Georgia) — RM-6592

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Donald W. Earnhart (petitioner) requesting the allotment of Channel 243A to Gray, Georgia, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted. Channel 243A can be allotted to Gray in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 243A to Gray, Georgia, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Gray, Georgia	--	243A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **April 27, 1989,** and reply comments on or before **May 12, 1989** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Larry G. Fuss
P.O. Box 4010
Opelika, Alabama 36803
(Consultant to petitioner)

Donald W. Earnhart
P.O. Box 3878
Jackson, Georgia 30233
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 33-00-36 and West Longitude 83-32-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-49

In the Matter of

Amendment of Section 73.202(b), RM-6541
Table of Allotments,
FM Broadcast Stations.
(Baton Rouge, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 6, 1989

By the Chief, Allocations Branch:

1. Vetter Communications Company, Inc. (petitioner), licensee of Station WTGE-FM, Channel 264C1, Baton Rouge, Louisiana, has filed a petition for rule making requesting the substitution of Channel 264C for 264C1 at Baton Rouge. Petitioner also requests the modification of its license to specify operation on the higher powered channel. Petitioner states it will construct the upgraded facilities accordingly, if granted.

2. We believe the proposal warrants consideration. The channel substitution can be made in compliance with the Commission's minimum distance separation requirements from the site specified by the petitioner. Petitioner has expressed its desire to utilize a site 16.3 kilometers (10.1 miles) southwest of the community.[1]

3. As requested, we shall propose to modify the license for Station WTGE-FM to specify operation on Channel 264C in lieu of Channel 264C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Baton Rouge.

4. In view of the fact that Baton Rouge, Louisiana, could receive expanded FM coverage the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Baton Rouge, Louisiana	251C, 264C1 268C, 273C	251C, 264C 268C, 273C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 27, 1989,** and reply comments on or before **May 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Michelle K. Rusk, Esquire
Peter H. Doyle, Esquire
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Suite 500
Washington, D. C. 20037
(Counsels for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The proposed restricted site coordinates are 30-19-35 and 91-16-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-50

In the Matter of

Amendment of Section 73.202(b), RM-6615
Table of Allotments,
FM Broadcast Stations.
(Walhalla, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Appalachian Broadcasting Company (petitioner) requesting the allotment of Channel 242A to Walhalla, South Carolina, as the community's first local FM service.[1] Petitioner states that it will apply for the channel, if allotted. Channel 242A can be allotted to Walhalla in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (7.0 miles) northeast to avoid a short-spacing to Stations WKLS, Channel 241C, Atlanta, Georgia, and WRXR-FM, Channel 242C2, Aiken, South Carolina.[2]

2. We believe the public interest would be served by proposing the allotment of Channel 242A to Walhalla, South Carolina, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Walhalla, South Carolina	--	242A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **April 27, 1989,** and reply comments on or before **May 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ron McKay
Associated Radio Resources
3 Broad Street
Charleston, South Carolina 29401
(Consultant to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that petitioner's request was signed by its technical consultant, and we are unable from the petition to determine if petitioner's consultant is also a principal of petitioner. Although a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission be signed and verified by the commenting or petitioning party and his/her address stated, unless they are represented by counsel. Therefore, petitioner is requested to clarify this matter and comply with the requirements of Section 1.52 in submitting its comments. Failure to do so could result in dismissal of its petition.

[2] The coordinates for this allotment are North Latitude 34-51-11 and West Longitude 83-00-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-51

In the Matter of

Amendment of Section 73.202(b),	RM-6576
Table of Allotments,	RM-6644
FM Broadcast Stations.	
(Port Matilda and Petersburg, Pennsylvania)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it two mutually exclusive petitions for rule making. P.A.C. Communications, Inc. (PAC), requests the allotment of Channel 300A to Port Matilda, Pennsylvania, and Victor A. Michael (Michael) requests the allotment of Channel 300A to Petersburg, Pennsylvania. Channel 300A would provide a first local FM service to either community. Both parties state an intention to apply for the channel at their respective communities, if allotted. However, Port Matilda and Petersburg are located only 24 kilometers apart while the Commission's Rules require a separation of 105 kilometers between co-channel Class A allotments.

2. Channel 300A can be allotted to Port Matilda in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.2 kilometers (1.4 miles) southwest to avoid a short-spacing to Station WGBE, Channel 300A, Williamsport, Pennsylvania. Alternatively, Channel 300A can be allotted to Petersburg in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence is required before the channel can be allotted to either community since they are both located within 320 kilometers of the U.S.-Canadian border.

3. We believe the public interest would be served by seeking comments on the allotment of Channel 300A to Port Matilda, Pennsylvania, or to Petersburg, Pennsylvania, since an interest has been expressed in providing both communities with their first local FM service. Therefore, we shall provide each proponent an opportunity to demonstrate in comments why their community should be preferred. In this regard, the parties should be guided by the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*. 90 FCC 2d 88 (1982). Accordingly, we alternatively propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
Option I		
Port Matilda, Pennsylvania	--	300A
Option II		
Petersburg, Pennsylvania	--	300A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 27, 1989,** and reply comments on or before **May 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Allan G. Moskowitz, Esq.
Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901-15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to PAC)

Victor A. Michael
R.D. #1, Box 59
Benton, Pennsylvania 17814
(Petitioner for Petersburg)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 300A at Port Matilda are North Latitude 40-46-58 and West Longitude 78-04-22. The coordinates for Channel 300A at Petersburg are North Latitude 40-34-18 and West Longitude 78-03-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-52

In the Matter of

Amendment of Section 73.202(b), RM-6613
Table of Allotments,
FM Broadcast Stations.
(Marlow, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 14, 1989; Released: March 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Austin Broadcast Services, Inc. (petitioner) requesting the substitution of Channel 221C1 for Channel 221C2 at Marlow, Oklahoma, and the modification of its license for Station KFXI(FM) accordingly. Channel 221C1 can be allotted to Marlow in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. By *Report and Order* adopted April 5, 1988, the Commission granted petitioner's request to upgrade Station KFXI(FM) from Channel 221A to Channel 221C2 and to modify the license of Station KZKQ(FM), Mangum, Oklahoma, to specify Channel 249A in lieu of its present Channel 221A. *See*, MM Docket 87-359, 53 Fed. Reg. 24940, July 1, 1988. In that proceeding, we noted that the Channel 221C2 1 mV/m contour lay within the Grade B contour of TV Channel 6 Station KAUZ-TV, Wichita Falls, Texas. However, we found that the allotment of Channel 221C2 to Marlow would not adversely impact the noncommercial educational allotments in the area. Based on this finding, petitioner has not included a noncommercial educational impact study with its present petition. However, it states that a study will be provided should one be requested. We find that the preclusion study is necessary. The need for such studies is not limited to those cases where the requested upgrade is only from a Class A channel. Rather, the determining factor is whether the 1 mV/m contour of the proposed Channel 221 facility, of any new and higher class, lies within the Grade B contour of a TV Channel 6 station. Therefore, petitioner is requested to furnish the appropriate study in initial comments herein.

3. In accordance with *Myrtle Beach, South Carolina*, 3 FCC Rcd 7269 (1988), guidelines for the preclusion study are as follows:

(a) The preclusion study should be done on each affected channel for each possible class of noncommercial FM station (that is, A, B1 and B in Zones I and I-A or A, C2, C1 and C in Zone II).

(b) For each class of noncommercial educational FM station, maximum power and antenna height and omnidirectional operation should be assumed.

(c) Preclusion should be considered to occur only if the noncommercial educational FM station would be prevented by the upgrade, and is not already precluded either by the existing Channel 221 station that is the subject of the proposal or by other commercial or noncommercial educational FM stations.

(d) Preclusion should be determined both inside and outside the Channel 6 Grade B contour. While the existence of the Channel 6 station imposes a burden on noncommercial educational FM applicants, determination of the preclusive effect of the Channel 6 station can be complicated and may be dependent on the particular transmitter site selected. Therefore, the initial preclusion area determination should be done without considering the Channel 6 station's impact. The Channel 6 impact can be included at a later stage of study, if necessary.

(e) Within any identified preclusion area, significant communities, normally those with a population in excess of 1,000, should be identified. Existing local noncommercial educational FM stations in the precluded communities should be listed.

(f) Optionally, if precluded communities without local noncommercial educational FM service are found, additional information can be provided, including:

(i) Availability of noncommercial educational FM service from stations licensed to nearby communities;

(ii) Availability of other channels for a noncommercial educational FM station in the precluded community (include consideration of Channel 6 station impact); and

(iii) Impact of Channel 6 on noncommercial educational FM channel availability in the community. If a precluded community is a reasonable distance beyond the Grade B contour of the Channel 6 station, then it is possible that the Channel 6 station has no effect on the availability of a particular class of noncommercial educational FM station in that community. The noncommercial educational FM channel that is closest to Channel 6 in frequency, and therefore more likely to be affected, is Channel 201. Preclusion in a community that is beyond the Channel 6 impact distance is not significant. The appropriate impact distance for Class C stations is found in Table A of Section 73.525(a)(1) of the Commission's Rules. Lesser distances are appropriate for other classes of noncommercial educational FM stations. For convenience, the distances have been calculated for Channel 201 and are as follows:

Class	Distance from Channel 6 station
A	165 kilometers
B1	189 kilometers
B	207 kilometers
C2	207 kilometers
C1	234 kilometers
C	265 kilometers

Precluded communities within these distances from the Channel 6 station generally constitute a negative factor to be weighed against the public interest gains sought through the upgrade.

4. As requested, we shall propose to modify petitioner's license for Station KFXI(FM) to specify Channel 221C1 in lieu of its present Channel 221C2. In accordance with Section 1.420(g) of the Commission's Rules, competing expressions of interest in use of the channel at Marlow will not be considered.

5. We believe the public interest would be served by proposing the substitution of Channel 221C1 for Channel 221C2 at Marlow, Oklahoma, since it could enable Station KFXI(FM) to increase its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Marlow, Oklahoma	221C2	221C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **April 27, 1989,** and reply comments on or before **May 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd, Powell & Taylor
1764 Church Street, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-38-54 and West Longitude 97-57-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-53

In the Matter of

Amendment of Section 73.202(b), 6614
Table of Allotments,
FM Broadcast Stations.
(Salem and Sioux Falls, South Dakota)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: February 15, 1989; Released: March 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Rayfield Crume (petitioner) requesting the substitution of Channel 263C1 for Channel 263C2 at Salem, South Dakota, and the modification of its construction permit for a new station at Salem accordingly. In addition, petitioner requests the substitution of Channel 252A for Channel 261A at Sioux Falls, South Dakota, and the modification of Station KCFS' license accordingly. Petitioner states that he will apply for Channel 263C1, if allotted to Salem. Comments in opposition were filed by Sioux Falls College, licensee of Station KCFS (College).

2. Channel 263C1 can be allotted to Salem in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in petitioner's construction permit. Channel 252A can be allotted to Sioux Falls in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station KCFS' construction permit.[1] Petitioner states that Station KCFS has not yet constructed the proposed facilities on Channel 261A. However, he states that he will reimburse Station KCFS for the reasonable "out-of-pocket expenses" associated with the change in channels.

3. College states that petitioner is incorrect in its description of the status of Channel 261A at Sioux Falls. It states that construction has been completed and the Commission has before it an application for a license to cover the facilities authorized in the construction permit (BLED-880817LL). Further, College states that Station KCFS has begun operation pursuant to automatic program test authority. Noting that Station KCFS has just completed the move from Channel 211 to Channel 261A, it argues that moving the station again in such a short period of time will create substantial public confusion. College also opposes the allotment of Channel 263C1 to Salem. It states that it would be enormously expensive to increase petitioner's facilities to the 100 kW and 984 feet proposed by the petitioner. Noting that Salem has a 1980 U.S. Census population of only 1,486 persons, College argues that the community cannot support such an investment and opines that petitioner may in reality be seeking to serve the nearby larger community of Sioux Falls. Regardless, College states that petitioner has not shown that he possesses the requisite financial resources to construct the proposed C1 facilities, pointing out that he has not yet constructed the "relatively modest" Class C2 facilities authorized in his present construction permit.

4. We believe the public interest would be served by proposing the substitution of channels at Salem and Sioux Falls, South Dakota, described above since it could enable petitioner to provide increased service to Salem and its surrounding area. We find that the College has not presented any valid reason why the proposal does not merit further consideration. The allegation that a second change in channel by Station KCFS may cause public confusion is not a sufficient reason to deny the increased service to Salem and its environs. We note that the Commission modified the license of Station KCFS to specify Channel 261A at its own request.

5. Petitioner has stated that he will reimburse Station KCFS for the cost of the changeover and a grant of its petition would be conditioned on such reimbursement. However, since petitioner appears to be under the misimpression that Station KCFS has not yet constructed its new facilities, it is requested to restate its intention to reimburse Station KCFS for the reasonable expenses incurred in the changeover. *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

6. Based on the above discussion, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Salem, South Dakota	263C2	263C1
Sioux Falls, South Dakota	223C, 228A, 243C, 247C1, 261A, 270C2, 284C	223C, 228A, 243C, 243C1, 252A, 270C2, 284C

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Sioux Falls College, permittee of Station KCFS, Sioux Falls, South Dakota, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 252A as proposed herein instead of the present Channel 261A.

8. Pursuant to Section 1.87 of the Commission's Rules, Sioux Falls College may, not later than **April 27, 1989,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Sioux Falls College to furnish additional information. If Sioux Falls College raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Sioux Falls College will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order*

will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the permittee of Station KCFS as follows: Sioux Falls College, 1501 South Prairie Avenue, Sioux Falls, South Dakota 57105.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **April 27, 1989,** and reply comments on or before **May 12, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553
(Counsel to petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 263C1 at Salem are North Latitude 43-29-18 and West Longitude 97-26-34. The coordinates for Channel 252A at Sioux Falls are North Latitude 34-31-57 and West Longitude 96-44-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

IOWA NETWORK ACCESS DIVISION — File No. W-P-C-6025

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to lease transmission facilities to provide access service to interexchange carriers in the State of Iowa.

MEMORANDUM OPINION AND ORDER

Adopted February 14, 1989; Released: March 6, 1989

By the Chief, Common Carrier Bureau:

1. In *Iowa Network Access Division* (*Order*), 3 FCC Rcd 1468 (1988), the Common Carrier Bureau granted authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's rules, 47 C.F.R. § 63.01, to Iowa Network Access Division (INAD) to lease transmission facilities to provide access service to interexchange carriers in the State of Iowa. Teleconnect Company (Teleconnect) has filed a "Petition for Clarification or, in the Alternative, Reconsideration" of the *Order*. An Opposition was filed by INAD and Teleconnect replied. By a letter dated December 9, 1988, INAD also requests that the Commission clarify the "automatic termination provision" of Section 63.05 of the Commission's rules, 47 C.F.R. § 63.05.

BACKGROUND

2. The *Order* granted INAD authority to lease and operate a number of DS-1 (1.544 Mbps) digital channels in order to provide subscribers of the 136 participating independent Iowa telephone companies (ITCs) the benefits of equal access and interexchange carrier competition from a centrally located tandem switch in Des Moines, Iowa. Under this authority, INAD is permitted to connect its tandem switch in Des Moines with the toll centers at which the 136 ITCs' end offices home. INAD will use existing trunks between the end offices and homing toll centers to connect the exchanges of the ITCs to its leased "network". The authority allows INAD to offer interexchange carriers (IXCs) Feature Groups B and D facilities to access ITC subscribers from INAD's centralized switch in Des Moines or from 16 other sites in Iowa. All toll traffic, both inter- and intra-state, is to transit the Des Moines switch for ticketing and billing. This authority included a condition that the State of Iowa not grant INAD authority which would materially alter INAD's projected inter- and intra-state usage of INAD's system.

3. In reaching its decision, the Bureau determined that INAD's inclusion of a mandatory terminating use requirement for interstate traffic was not "unreasonable [nor would differ] substantially from the normal way access is provided, as both an originating and terminating service by the local exchange company." *Order* at para. 33. Teleconnect seeks clarification or reconsideration of this determination. For the reasons discussed below, we dismiss Teleconnect's petition.

DISCUSSION

4. *Standing*. Teleconnect is an interexchange carrier providing telecommunications services in the State of Iowa. Under Section 405 of the Communications Act of 1934, 47 U.S.C. § 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, a petition for reconsideration may only be filed by (1) a party in interest or (2) a person aggrieved or whose interests were adversely affected by the Commission's action and who can demonstrate good cause why it was not possible to participate in earlier stages of the proceeding. Because Teleconnect did not participate in earlier stages of this proceeding, it has not established that it is a party in interest. *See Simon Geller*, 91 FCC 2d 1253, 1255 (1982).

5. Teleconnect explains that its lack of earlier participation was predicated on its understanding that use of INAD's system would be permissive, *i.e.*, interexchange carriers could use the system for originating traffic only, for terminating traffic only, or for both types of traffic. Therefore, it says, it did not deem it necessary to participate in this proceeding sooner. It also states that it believed that if the issue of terminating traffic arose it would be addressed in a later tariff proceeding. Now that the Bureau has permitted INAD to impose a mandatory usage requirement for terminating traffic, Teleconnect feels it is being required to use facilities for which it has no need.

6. The issue of mandatory use of INAD's network was raised by Northwestern Bell Telephone Company (NWB) in the first round of comments filed in response to INAD's Section 214 application. *See e.g.*, NWB Comments at pp. ii and 2-8. Indeed, NWB specifically requested that the issue be addressed in the Section 214 proceeding. *Id.* at pp. 8, 18 and 19. There were additional opportunities for interested parties to comment on INAD's proposal, including the mandatory use issue. *See, e.g.*, Bureau Letter to INAD and NWB, dated August 31, 1987. The arguments in favor of, and opposed to, mandatory use of the system were given thorough consideration. *Order* at paras. 28-33. The other arguments Teleconnect raises in support of its petition for reconsideration also were made by NWB in its original comments and considered in the *Order*. Teleconnect has not shown it was not possible to participate in earlier stages of this proceeding. Moreover, it offers no new evidence warranting reconsideration. Its petition therefore is dismissed as being in violation of 47 C.F.R. § 1.106.

7. *Section 214 Condition*. The Bureau granted INAD authority to provide its centralized equal access services subject to the condition that any state authority INAD requires not materially affect the relative amounts of inter- and intra-state usage of the system. INAD submitted documentation arguing that its state authority satisfies the Bureau's condition. That submission is not refuted. By letter dated January 6, 1989, INAD provided copies of orders for its centralized equal access services (Feature

Group D) from some of the carriers who have complained in various stages of this proceeding as well as other IXCs. Thus, it appears that carriers will take Feature Group D access as initially proposed by INAD. Therefore, we conclude INAD's state authority satisfies our condition.

8. *Section 214 Certificate Termination.* Relying on *Graphnet Systems, Inc.*, 71 FCC 2d 1066 at n. 7 (1979), INAD interprets Section 63.05 of the rules to mean that the twelve-month period within which facilities must be leased commences on the date the Section 214 certification is "perfected."[1] We agree that in the circumstances of this case INAD would not have exercised prudent judgment had it commenced leasing on receipt of the *Order*, as conditioned. The ISUB could have denied INAD authority to require intrastate traffic to use the network for origination and/or termination, thereby depriving INAD of the primary source of cost recovery for the network. This would have jeopardized the Section 214 authorization. Accordingly, the twelve-month leasing period for INAD's Section 214 certificate will commence from the effective date of this order.

9. ACCORDINGLY, IT IS ORDERED, that the Petition for Clarification or, in the Alternative, Reconsideration filed by Teleconnect Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Section 63.05 provides (in part) that:

> Unless otherwise determined by the Commission upon proper showing in any particular case, . . . where facilities authorized have not been leased or acquired, within 12 months from the date of the Commission's authorization, . . . such authorization shall terminate at the end of such 12 . . . months . . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 6, 1989

CENTRAL TELEPHONE COMPANY FILES REVISIONS TO COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On February 13, 1989, Central Telephone Company filed revisions to its permanent cost allocation manual for the separation of regulated and nonregulated costs. The original manual was filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manual on December 15, 1988, conditioned upon the filing of numerous specified revisions. *See Central Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 7126 (1988).

Parties may file comments on the proposed revisions to the cost manual no later than **March 27, 1989.** Replies should be filed by **April 11, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 6, 1989

ROCHESTER TELEPHONE CORPORATION FILES REVISIONS TO COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On February 10, 1989, the Rochester Telephone Corporation filed revisions to its permanent cost allocation manual for the separation of regulated and nonregulated costs. The original manual was filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manual on December 13, 1988, conditioned upon the filing of numerous specified revisions. *See Rochester Telephone Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 7056 (1988).

Parties may file comments on the proposed revisions to the cost manual no later than **March 27, 1989.** Replies should be filed by **April 11, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

General Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1690

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1989; Released: March 6, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the General Telephone Operating Companies (GTE),[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, GTE filed a cost allocation manual on August 27, 1987. That manual described GTE's nonregulated activities, listed the activities GTE proposed to treat as incidental activities, and provided information on GTE's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *GTE Order* [3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved GTE's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988.[4] We required, however, that GTE submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[5]

3. GTE submitted its revisions, which provide additional information regarding the problem areas identified in the *GTE Order*, on August 5, 1988. According to GTE, these revisions comply fully with that Order.[6] No party commented on these revisions.

4. After reviewing the contents of GTE's revised manual,[7] we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *GTE Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas in which GTE has complied fully with Commission requirements and the *GTE Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve GTE's August 5, 1988 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than April 30, 1989.[8]

II. DISCUSSION

A. Overall Sufficiency of the Manual

5. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *GTE Order*, we required GTE to provide additional, and in certain instances corrected, information regarding each of these areas. In its revised manual, GTE provides extensive additional information regarding these areas.

B. Affiliate Transactions

6. In its initial manual, GTE proposed to record certain affiliate transactions at market rates, which it defined as "the price actually given in current market conditions where both buyers and sellers' are willing to consummate an arm's length transaction."[9] GTE also proposed to record transactions with GTE Directories Corporation at terms determined by a contract.[10] In the *GTE Order*, we determined that these proposals did not comply with the Commission's criteria for determining the terms of affiliate transactions. We required GTE to propose terms complying with those criteria and, to provide GTE with guidance in revising its definition of market rate, we described the criteria for employing market rates that had been articulated in the *U S West Order*.[11] That Order uses the term "prevailing company price" to describe the circumstances under which a market rate may be employed.[12]

7. In its revisions, GTE uses prevailing price for transactions with the same GTE affiliates subject to market rates in the initial manual. GTE defines prevailing price as the "price paid or received from nonaffiliated third parties to consummate an arms' length transaction for services or supplies actually provided or received."[13] For transactions involving the provision of a service, this definition is inconsistent with the criteria described in the *GTE Order* because it would allow a single transaction or offer, with a non-affiliate, to establish a market price.[14] In addition, in the *NYNEX Compliance Order*,[15] we determined that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[16] We held that the only general exception to this costing methodology "permits the carrier to record an affiliate's services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[17] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[18] Finally, untariffed services that carriers provide to nonregulated affiliates must also be recorded at the carriers' fully distributed costs unless the carriers provide the same services to nonaffiliated entities in a sufficiently large number of cases to establish a market rate.[19] In its further revisions, GTE must verify that each affiliate transaction involving the provision of a service that it proposes to provide at market or prevailing company prices meets the above criteria.[20]

8. In the case of its contractual arrangement with GTE Directories Corporation, GTE now indicates that "under a contract, the price is determined according to market factors specific to each affiliate and nonaffiliated customer's area."[21] This statement is also insufficient to establish compliance with the affiliate transaction rules.[22] In its further revisions GTE must specify terms for these transactions that are consistent with the affiliate transaction rules.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

Account 2121 - Buildings and Account 6121 - Land and Building Expense

9. In the *GTE Order* we questioned GTE's apparent discrepancy in allocating "multi-use" cost pools in the investment Account 2121 based on "plant and support operations wages and salaries," while allocating the "common" cost pool in the expense Account 6121 based on "relative value in land and buildings." GTE has revised its manual by changing the allocation in Account 6121 to reflect the allocation in Account 2121. We have reviewed these accounts and find that there are some discrepancies in cost allocation. The cost pools for "central office buildings" are directly assigned to regulated. However, in Section 7.3 of the manual, GTE indicates that it assigns costs to regulated, nonregulated and common cost pools by analyzing building use. It states that it determines this use by reviewing building location records, which are classified into principal usage categories, e.g., central office. If this is the case, any central office location would apparently be considered part of the central office building cost pool which is directly assigned to regulated activities, even though these central offices may perform a considerable amount of nonregulated activities.[23] In addition, the only common cost pools for "multi-use buildings" are apportioned based on "plant and support operations wages and salaries." GTE has not made clear why this apportionment factor might reflect all nonregulated usage of its building locations in which both regulated and nonregulated activities are performed. Therefore, GTE must explain why the current cost pool assignment and apportionment methods for these accounts result in cost causality or revise the apportionment method by assigning its building costs to cost pools on a building-by-building basis as described in the *Nevada and Pacific Order*.[24] In addition, it must explain the criteria utilized in assigning these accounts to the current cost pools and the basis used to apportion the cost pools between its regulated and nonregulated activities. Alternatively, GTE may revise its manual to provide for a new allocation, but it must provide complete details of its apportionment methods, and explain why this allocation reflects a more appropriate cost causality.

Account 2122 -Furniture and Account 6122 - Furniture and Artwork Expense

10. In Section 7.3.5 of GTE's explanation of the cost apportionment tables, GTE incorrectly lists Account 2112 - Furniture and Account 6112 - Furniture and Artwork Expense. The correct listing is Account 2122 for the former and Account 6122 for the latter. GTE should make this correction in its further revisions.

Account 5001 - Base Area Revenue through Account 5270 -Carrier Billing and Collection Revenue and Account 5301 - Uncollectible Revenues - Telecommunications and Account 5302 - Uncollectible Revenues - Other

11. The *GTE Order* required GTE to revise its manual to include information,[25] omitted from the initial manual, which is contained in Appendix C to the *Automated Reporting Requirements Order*.[26] GTE has complied, in part, by including Accounts 5000, 5080, 5100 - 5169, 5230 - 5270, 5301, and 5302. Revenue Accounts 5000 through 5270 are directly assigned to the regulated pool, while Uncollectible Accounts 5301 and 5302 are directly assigned to regulated and nonregulated pools. In its August 5 revisions, GTE did not include an account in the manual for unregulated services revenues. Therefore, it was unclear where GTE would account for its unregulated revenues. In its further revisions on December 1, however, GTE noted that "uncollectible revenues associated with nonregulated activities are specifically identified in a nonregulated subsidiary record category."[27]

12. In the *Further Order on Reconsideration*, we required the carriers to use Account 5280, Nonregulated Operating Revenue,[28] to record the nonregulated revenues derived from activities which share assets or revenues with regulated activities. Therefore, we require GTE to list such an account in its further revisions, and indicate that it will be assigned to nonregulated activities. Furthermore, we are uncertain as to the relationship between GTE's booked uncollectibles and its mix of services, and how it can directly assign uncollectibles to Accounts 5301 and 5302. We, therefore, require GTE to either clarify how it assigns uncollectible revenue to pools or revise its manual to apportion its uncollectible revenues from its telecommunications operations in proportion to its relative telecommunications revenues and its other uncollectible revenues in proportion to its relative non-telecommunications revenue.

Account 6611 - Product Management Expense, Account 6612 - Sales Expense, and Account 6613 - Product Advertising Expense

13. In the *GTE Order*, we required the carrier to justify its proposal to use "product management," "sales" and "product advertising" allocators for shared expenses incurred to support both regulated and nonregulated operations which cannot be directly assigned to either regulated or nonregulated accounts. GTE's response is that "the common cost pool consists of shared expenses incurred to support both regulated and nonregulated operations which can not be directly assigned to either regulated or nonregulated accounts."[29] We find this statement insufficient to justify use of these allocators for product management, sales, and product advertising expenses. Therefore, we direct GTE to amend its manual to use a more cost causative allocation method to apportion these expenses such as survey time reporting or a marketing allocator.[30]

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the August 5, 1988 and December 1, 1988 revisions to GTE's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

15. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than **April 30, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No 87-1764 (filed December 14, 1987).

[2] The General Telephone Operating Companies are: General Telephone Company of California, General Telephone Company of Florida, GTE MTO Inc., General Telephone Company of the Northwest, Inc., General Telephone Company of the South, General Telephone Company of the Southwest, and Hawaiian Telephone Company.

[3] General Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 3573 (1988) (*GTE Order*).

[4] The Common Carrier Bureau granted GTE a limited waiver regarding the filing of certain retroactive revisions. General Telephone Operating Companies, Petition For Waiver of the Requirement that Revisions to the GTE Cost Allocation Manual Shall be Effective Retroactive to January 1, 1988, DA 89-39, AAD 8-1928 (released January 26, 1989).

[5] *GTE Order*, at 3573, paras. 2-3; *id.* at 3580, paras. 65-66.

[6] GTE Revised Manual, Cover Letter, dated August 5, 1988.

[7] On December 1, 1988, GTE submitted further revisions which it deemed routine amendments. Those revisions are considered acceptable except as otherwise indicated herein.

[8] GTE may defer its March 31, 1989 quarterly updates, if any, until April 30, 1989.

[9] GTE Initial Manual at Section 6-1.

[10] *Id.* at Section 6, Exhibit I, page 1.

[11] *GTE Order*, 3 FCC Rcd at 3575, para. 18, *citing* U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 199, paras. 32-34 (1988) (*U S West Order*).

[12] *U S West Order*, FCC Rcd at 199, paras. 33-34.

[13] GTE Revised Manual at Section 6-2.

[14] *GTE Order*, 3 FCC Rcd at 3575, para. 18; *U S West Order*, 3 FCC Rcd at 199, paras. 33-34.

[15] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5976 (1988) (*NYNEX Compliance Order*).

[16] *Id.*, 3 FCC Rcd at 5980, para. 20.

[17] *Id.*, *quoting* 47 C.F.R. §32.27(d).

[18] *U S West Order*, 3 FCC Rcd at 199, para. 34; see 47 C.F.R. §32.27(d).

[19] *Id.* at 199, para. 33.

[20] If the affiliate transaction involves a transfer of assets, the carrier should record it at the prevailing price held out to the general public, that is, the prevailing company price. If there is no prevailing company price, asset transfers from the affiliate to the carrier should be recorded at the lower of net book cost or fair market value, while asset transfers from the carrier to the affiliate should be recorded at the higher of net book cost or fair market value. GTE's definition relating to transfer of assets should conform to this definition.

[21] GTE Revised Manual at Section 6, Exhibit I, page 1.

[22] *See* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd at 289, para. 18 (1988) (*Nevada and Pacific Order*).

[23] *See* GTE Revised Manual at Section 3.2 (listing "Central Office Products & Services" as a nonregulated activity).

[24] *See Nevada and Pacific Order*, 3 FCC Rcd at 293, para. 56.

[25] *GTE Order*, 3 FCC Rcd at 3577, paras. 34-35.

[26] Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies, Report and Order, 2 FCC Rcd 5770, 5775 (1987), *modified on recon.*, 3 FCC Rcd at 6375 (1988).

[27] *See* revisions submitted by GTE on December 1, 1988, Account 5301, at 1140Y-5.

[28] *Further Order on Reconsideration*, 3 FCC Rcd at 6702, para. 12.

[29] GTE Revised Manual, Exhibit A.1, at 1123Y-5.

[30] It should be noted that the use of a marketing allocator for promotional support is acceptable.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-154

In Re

Reexamination of the Commission's
Cross-Interest Policy

POLICY STATEMENT

Adopted: October 27, 1988; Released: February 28, 1989

By the Commission:

INTRODUCTION

1. On May 14, 1987, we instituted a *Notice of Inquiry* (*Notice*) into the cross-interest policy, which essentially prevents individuals or entities from having "meaningful" cross-interests in two broadcast stations, or a daily newspaper and a broadcast station, or a cable television system and a television broadcast station, serving substantially the same area.[1] As a result of our comprehensive review of the cross-interest policy, we are today issuing this Policy Statement reducing the scope and applicability of that policy. A careful review of the record, our considerable regulatory experience in administering this policy, and our analysis of the public interest costs and benefits, convince us that continued review of many relationships within the cross-interest policy can no longer be justified as a matter of sound policy. Because issues remain with respect to the policy as it applies to key employee relationships, certain nonattributable equity interests and certain joint ventures, we are issuing a *Further Notice of Inquiry / Notice of Proposed Rule Making* requesting additional comment on those matters.

PURPOSE AND SCOPE OF INQUIRY

2. In the *Notice* in this proceeding, we sought comment on the possible elimination of the cross-interest policy.[2] Based on our experience in applying the policy and the developments in the communications marketplace, we expressed skepticism that the cross-interest policy, as applied on an *ad hoc* adjudicatory basis, continued to serve the public interest. Our *Notice* solicited comment on whether retention of the cross-interest policy is necessary to prevent anticompetitive abuses from occurring, whether alternative policing mechanisms exist to assure competition, and whether continued regulation of relationships not specifically addressed by the Commission's rules is necessary. More specifically, we requested commenters to discuss the role of market forces, private remedies, and the antitrust laws to deter anticompetitive misconduct and to ensure competitive communications markets. In addition, we asked whether we should amend our attribution rules to include key employees.

3. In the *Notice*, we identified certain relationships to be within the ambit of the cross-interest policy. These relationships involve key employees, consulting positions, advertising agency representative relationships, time brokerage arrangements, sales representative relationships, nonattributable equity interests, and joint ventures. We observed that the concerns relating to certain cross-interest relationships had either been eliminated or specifically addressed by the Commission's rules. In particular, we noted that sales representative relationships had been stricken from the cross-interest policy because we found the examination of such relationships unnecessary to promote economic competition and that, to the extent that abuses arose, they could be addressed more adequately by remedies other than regulatory intervention. We further noted that certain minority stock interests and positional interests, such as officers and directors, were now encompassed by the local ownership rules and, therefore, the need to address these interests in the context of our existing cross-interest policy was unnecessary. Accordingly, based upon the considerations described above, we proposed to eliminate most of the remainder of the existing policy.

4. We conclude that retention of our policies relating to consulting positions, advertising agency representative relationships and time brokerage arrangements are no longer warranted in the public interest. [3] Before discussing the reasons for this determination, we shall initially describe the different types of cross-interests addressed in this *Policy Statement* which have created regulatory concern under our existing policy, provide an overview of the policy's evolution, and summarize the comments filed in this proceeding. We shall then focus our attention on the reasons which, considered together, persuade us that these parts of our cross-interest policy are no longer essential to promote economic competition or diversity of viewpoint or otherwise necessary to serve the public interest.

BACKGROUND

1. *Cross - Interests Proscribed under Policy*

5. The cross-interest policy is designed to address instances in which an individual or entity has a "meaningful" relationship in two competing media outlets serving substantially the same area. The meaningful relationships which the Commission has determined to be encompassed under the policy are set forth below.[4]

6. *Consulting Positions*. The Review Board has applied the cross-interest policy where a consultant who provides advice and/or has what would now be an attributable interest in one media outlet in the market also provides advice to other competing stations in the same market.[5] For example, the policy was applied where a spouse of the sole owner of one radio station was to serve as an accountant/bookkeeper or program director for that station as well as serve in a consulting capacity for competing radio stations in the same market. The Review Board reasoned that the consultant had access to confidential financial or programming information of competitors and, therefore, had the potential to impair arms-length competition.[6]

7. *Time Brokerage Arrangements*. The cross-interest policy has also been considered in instances where a radio station proposes to enter into a "time brokerage" arrangement to purchase varying amounts of time from a com-

peting station in the same market in order to air programming and sell advertising during those segments. Generally, the Commission has found that such proposals implicate the cross-interest policy because of the potential for diminution of competition arising from owning and programming one station and making programming decisions at an independently-owned station.

8. *Advertising Agencies.* The cross-interest policy is also triggered when an individual has ownership interests in both a broadcast station and an advertising agency, and the ad agency purchases advertising time on behalf of its clients on other stations in the same service in the same market as the commonly owned station. In these instances, the Commission reasoned that the ad agency may be in a position to favor the commonly-owned station as against competing stations in the placement of advertising. In the past, hearings were held to determine whether such cross-interests implicated the policy.[8]

2. Development of the Cross - Interest Policy

9. The cross-interest policy has evolved almost entirely through case-by-case adjudication. The cross-interest policy was developed in the 1940's as a supplement to the "duopoly" rule, which then prohibited the common ownership, operation, or control of two stations in the same broadcast service covering substantially the same area.[9] At that time, either actual working control or ownership of fifty percent or more of the stock of the licensee were necessary to meet the "ownership, operation or control" requirement of the "duopoly" rule.[10] This phrase, therefore, did not encompass minority stock interests or positional interests such as being an officer, a director or a manager.[11] Thus, situations in which the owner of one station obtained an interest in another station in the same area through a position as an officer, director, manager or minority stockholder were not prohibited by the "duopoly" rule then in effect. Even though these cross-interests were not covered by the "duopoly" rule, they were perceived to create the same kind of anticompetitive concerns addressed by the rule. To address these concerns, the Commission applied a policy which went beyond the scope of the "duopoly" rule by limiting "cross-interests" in more than one broadcast service covering substantially the same area.

10. One of the earliest cases where this new policy was applied involved an entity which had a controlling interest in one television station and a minority stock interest at another television station in the same community.[12] In a similar vein, this policy was invoked by the Commission where principals proposed to be officers or directors of competing stations in the same market.[13] In both instances, the Commission noted that the underlying purpose served was to promote and maintain full competition between stations located in the same city.[14] Further, the Commission indicated that prevention, not correction, of anticompetitive practices was the goal sought. In subsequent decisions, the Commission expanded the purpose underlying the cross-interest policy beyond its original intent by stating that it was designed to restrict not only those relationships having the potential to threaten economic competition but also those having the potential to lessen diversity of viewpoint.[15]

11. In an effort to promote the dual goals of competition and diversity, the cross-interest policy was invoked, in 1969, to prohibit a national or regional sales representative company that was wholly or partially owned by a licensee of a broadcast station from representing and soliciting advertising for competing stations in the same service in the same area.[16] This policy, known as the *Golden West* policy, was based upon the concern that such a "sales rep" could impair competition by colluding or price fixing in the sale of advertising time, or placing the station it did not own at a competitive disadvantage. The Commission also expressed concern that this type of relationship was antithetical to the promotion of diversity of viewpoint. In 1981, the Commission instituted a Rule Making proceeding in which it questioned the regulatory wisdom underlying the *Golden West* policy. Finding that limiting these types of relationships did not appear necessary to further the goals of promoting diversity of viewpoint or economic competition, the Commission eliminated the policy.[17] The Commission concluded that the operation of market forces and application of the antitrust laws would be adequate to deter anticompetitive practices that the policy sought to address.

12. Although the cross-interest policy was originally developed as an intra-service supplement to the duopoly rule, it was subsequently extended to the Commission's other local ownership rules,[18] including the broadcast one-to-a-market rule,[19] and the broadcast/newspaper[20] and cable/television cross-ownership rules.[21] Subsequent case-by-case adjudications, under the cross- interest policy, have resulted in creation of additional restraints beyond those expressly prohibited by the local ownership rules.[22]

13. At the time the policy developed, and for much of its history, the attribution rules were narrow, leaving many relationships outside their purview.[23] Under the former rules only the duopoly provisions were in effect. Thus, only the cross-interest policy prevented an owner of one station from holding a position as an officer, director, manager, or minority stockholder in a competitor. In 1953, the attribution rules were revised, as they applied to the national ownership limit, to include all minority interests, partners, and officers and directors.[24] Recently, the attribution rules were further modified to exempt from their scope holders of less than five percent of the voting stock of the licensee and limited partners.[25] In addition, relief from attribution was provided to certain officers and directors whose duties are unrelated to broadcast operations. Thus, under the revised attribution rules, ownership of as little as five percent of the voting stock of a broadcasting station is treated the same as majority ownership for purposes of applying the local ownership rules. As a result of these intervening revisions, the attribution rules now proscribe many of the interests that originally led to the adoption of the cross-interest policy.[26] For example, interests of officers and directors, and of minority stockholders that were originally prohibited by the cross-interest policy alone now come within the purview of Commission rules. Similarly, where voting ownership interests at or above five percent are involved, the rules, instead of the policy, now apply.

SUMMARY OF COMMENTS

14. The majority of commenters agree with the initial views expressed in the *Notice* that the cross-interest policy no longer serves the public interest and should be eliminated.[27] Commenters supporting elimination of the policy, including NAB, Group W, Morgan Stanley, and Cox, cite the confusion and uncertainty created by the cross-interest policy as it relates to the multiple ownership

rules. They express concern with the *ad hoc* application of the policy that fails to provide the kind of clear guidelines which the rules provide in this area. They maintain that the unpredictable application of the cross-interest policy may require evaluation whether a relationship permitted by the Commission's rules will be transformed into one which is prohibited pursuant to the cross-interest policy. Such a determination is difficult for a licensee to make in light of the varying case law, and any conclusion in this area often lacks certainty, thus impeding efficient decision making. Commenters further assert that the concerns underlying the policy are now addressed by either market forces or alternative rules and remedies. They argue that market pressure creates incentives for licensees to meet the needs and desires of the public rather than enter into relationships which would have a deleterious effect on competition and diversity. Audience reaction aside, commenters maintain that state and federal antitrust actions, as well as remedies based on contracts between parties, will discourage abuses and provide relief should any such abuse occur. Thus, they conclude that the public interest can be protected through means less restrictive and more certain than the cross-interest policy.

15. Specifically, these commenters argue that retention of the policy harms the public interest through delay and, in many instances, discouragement of investment in media properties. They assert that the risk of a cross-interest challenge always exists even if the relationship is structured to comport with Commission rules. They stress that this uncertainty hampers the ability of broadcasters to enter into relationships which may improve existing facilities or provide new facilities.

16. These commenters assert that the policy is no longer necessary to promote competition and viewpoint diversity due to the growth of the marketplace. They maintain that the proliferation of media outlets has attenuated the need for Commission-imposed restraints to ensure against anti-competitive abuses. They assert further that, in the event such abuses do occur, marketplace forces should correct the misconduct without Commission intervention. They argue that the cross-interest policy is an artificial and unnecessary impediment to the functioning of the marketplace which, due to competitive pressure, polices itself. They conclude that practices that are anticompetitive and reduce diversity are simply too difficult to coordinate due to the number of outlets and, therefore, will be ineffective. Further, stations must try to optimize performance in order to retain a share of the market, and that effort could be thwarted by an adverse reaction, from their audience or competitors, to any anticompetitive practices.

17. All commenters who support elimination of the cross-interest policy also argue that the local ownership rules, particularly the attribution provisions, include the majority of relationships sought to be addressed by the cross-interest policy. They point out that the local ownership rules and the attribution provisions are the product of extensive Rule Making proceedings designed to determine which interests create a level of concern sufficient to require proscription. They maintain that relationships falling outside of the rules are of minimal significance and have, therefore, been deemed nonattributable. They further assert that the cross-interest policy undercuts the purpose of these Rule Makings by creating uncertainty where the rules strive for clarity. Commenters, therefore, conclude that the local ownership rules and the attribution provisions should stand as the Commission's determination of what relationships are inconsistent with the public interest. To the extent that the multiple ownership rules do not address all relationships contemplated by the policy, commenters reiterate their contention that alternative policing mechanisms exist in the marketplace which would discourage anticompetitive misconduct before it occurs, or provide a remedy in the event such abuse arises.

18. In opposing elimination of the cross-interest policy, CFA/TRAC argue that while streamlining the policy is desirable, elimination is unwarranted. They point to what they characterize as an overwhelming desire of the Commission to eliminate all multiple ownership rules as demonstrated by a recent rule making proceeding inquiring into the duopoly and one-to-a-market rules.[28] These commenters specifically take issue with the Commission's assertion, in the *Notice*, that revisions of the attribution rules have abrogated the need for the cross-interest policy in many instances. They argue that, in light of the duopoly Rule Making proceeding, it is disingenuous for the Commission to rely on the local ownership rules and the attribution provisions as support for eliminating the cross-interest policy. CFA/TRAC points out that the Commission has previously predicated repeal of one policy on the existence of another even as the latter faces repeal, and is following a similar course in the instant proceeding. They assert that repeal of the one-to-a-market rule[29] has already been accomplished through a liberal policy of granting stays of outstanding divestiture obligations. Thus, in conjunction with the Commission's lack of commitment to the ownership rules, repeal of the cross-interest policy will leave unchecked relationships which will lead to an increase in predatory practices resulting in a diminution of competition and a reduction in program options. They conclude that retention of the policy in a clarified form is, therefore, required to promote the public interest.

19. Similarly, in reply comments, ABI maintains that the NAB relies too heavily on the attribution provisions as support for elimination of the cross-interest policy. ABI argues that the policy is designed to supplement the attribution provisions and provide the Commission with the means by which to promote, independent of other government agencies, arms-length competition. It further asserts that the NAB points to no instance in which the antitrust laws have addressed competitive abuses of the type encompassed by the cross-interest policy, thus failing to demonstrate that reliance on antitrust laws to cope with cross-interest concerns is either an effective deterrent or remedy. Arguing that the cross-interest policy is necessary to promote arms-length competition, ABI concludes that the Commission's rules, without more, are inadequate to protect against certain anticompetitive practices. ABI contends that where specific rules are applicable the cross-interest policy should not apply, but where there are gaps in the rules the cross-interest policy is required to stem abuses. ABI concludes that the policy should, therefore, be clarified and retained for use only on an "as needed" basis.

DISCUSSION

20. Although, as indicated, there are aspects of this policy with respect to which further comment is being sought, the analysis that follows provides not only the justification for the changes we are adopting but estab-

lishes a background against which the remainder of the policy should eventually be judged. After a careful review of the record in this proceeding, we find that the public interest would be better served by reducing the scope of the cross-interest policy.[30] While this policy may have been at one time regarded as necessary to preserve competition and diversity of viewpoint, a number of different factors, including changes in the mass media marketplace, modifications of the attribution rules, and the adequacy of other legal remedies, convince us that a substantial part of this policy is not essential to maximize diversification of viewpoints to the public or to prevent undue concentration of economic power. Similarly, we are further convinced that, with respect to the interests addressed herein, the costs associated with continued case-by-case review outweigh the minimal public interest benefits that might be derived therefrom. As we explain below, we are confident that the public's access to a multiplicity of programs, information, and viewpoints will not be adversely affected as a result of our removal of these unnecessarily restrictive aspects of the policy. We are also equally confident that economic competition in mass media markets will not materially diminish, but, on the contrary, will continue to flourish to the overall benefit of the public.

Growth of Media Outlets

21. Since the implementation of the cross-interest policy, there has been rapid and widespread growth in mass media outlets. This growth has led to a significant increase in diversity nationwide and, of even more relevance to the instant proceeding, locally. While we do not rely upon these changes alone to reach the determinations herein, we do believe that, together with the other factors presented below, they undercut the notion that any single entity or individual is capable of manipulating or otherwise skewing competition in the marketplace of ideas or in the economic marketplace to the detriment of the public through the cross-interests mentioned above.

22. *National Growth.* To the extent that the logic behind the cross-interest policy was appropriate when first developed, the substantial growth in broadcast services across all markets, and the resulting increase in competition and diversity have reduced our concerns about the relationships addressed by the policy. For example, between 1950 and 1988, the total number of AM, FM, and TV broadcast stations authorized increased from 3,144 to 12,207 outlets, an increase of 288.3%.[31] Moreover, continued growth in the broadcast services can be expected as a result of recent Commission actions designed to foster growth of the industry.[32] In addition, there has been substantial expansion of alternate media services such as cable television, low power television (LPTV), and video cassette recorders (VCRs).[33] The potential for even further growth of media outlets exists from other developing technologies, including multipoint distribution systems (MDS) and satellite master antenna television systems (SMATVs).[34]

23. *Local Growth.* This growth of media outlets on a national level is paralleled by the growth of such outlets on the local level. In analyzing the need for the cross-interest policies, the number of outlets at the local level is more relevant than national growth because the policy was developed as a supplement to the local ownership rules. With this in mind, we note that a study submitted by the NAB[35] assessed the number of media outlets, including publications, within all television markets (Designated Market Areas). The study shows that there are a large number of media outlets and information sources in local markets of all sizes. For example, whereas the top 25 markets average about 72 radio and television stations per market, even the smallest television markets average about 9 radio and television outlets per market.[36] In addition, our own analysis of Arbitron data by Metropolitan Statistical Area, the geographic market measure that may be more appropriate for radio reception, shows that while the top 25 radio markets average approximately 35 total AM and FM stations, even the smallest radio markets average approximately 10 commercial AM and FM stations. As these figures demonstrate, there are a significant number of commercial broadcast outlets throughout markets of all sizes. Further, if cable and VCRs are taken into account, listeners and viewers have even more sources of programs. Cable penetration actually increases as the size of television markets decreases,[37] and VCR penetration appears to be relatively constant across market sizes.[38] This multitude of media sources provides audiences with a wide diversity of choices, and also encourages broadcasters to provide service in the public interest.

24. We believe the competitive and diverse market which has developed since the initial implementation of the cross-interest policy substantially attenuates the need for our regulatory oversight of the interests at issue here to promote diversity and economic competition. As suggested by Cox, market conditions have reduced diversity concerns because stations are under strong market pressure to maximize performance and typically do so through providing service desired by the public.[39] With many competing media outlets available to the public, consumers can easily switch from one station to another if the first station's programs do not suit their tastes. Hence, stations have strong incentives to take into account the tastes and needs of viewers or listeners. Moreover, we recognized, in a previous proceeding eliminating regulations which encroached on licensee's business practices, that the increased number of stations and the increase in facilities give new importance to the uniqueness of a program format in an effort to attract advertising dollars.[40] This plethora of media services, and the resulting increase in the diversity of voices, therefore, strongly undercuts, in our view, any underlying need for restraints on consulting agreements, advertising agencies, and time brokerage arrangements to enhance diversity.

25. Moreover, the considerable choice which exists in the marketplace creates incentives for service providers to compete as vigorously as possible. Because of the many competing stations, they are more likely to be acutely aware of their audience's desires, and to attempt to meet those desires in order to compete successfully. For example, it is doubtful that consulting agreements would continue to be a legitimate concern, since the station entering into such an agreement must continue to remain responsive to the needs and interests of its audience or risk losing a portion of that audience. Thus, a station would likely disregard advice from a consultant which would only serve to protect the consultant's cross-interest and would not improve the outlet's competitive stance. If a station is unresponsive to its audience, its ratings will drop, and the resultant decrease in earnings will influence the station as much as, if not more than, Commission policy. Accordingly, we believe that the remarkable growth in the broadcast market, and the mass media marketplace generally, are important factors which suggest that continued review of interests such as these is not

needed to achieve its original and primary goal of preserving diversity and competition among media voices in a given market.

Costs / Burdens Imposed By Operation Of The Cross - Interest Policy

26. We have also evaluated the costs and burdens imposed on the public by continuing to scrutinize consulting arrangements, advertising agency arrangements, and time brokerage agreements. We conclude that these aspects of the cross-interest policy impose costs and burdens on the public, as well as the Commission, which are difficult to justify given the reduced need for continued oversight of these relationships. As discussed below, these costs vary in character, but are alike in that they are not counterbalanced by any significant concomitant public interest benefits.

27. *The Policy Creates Uncertainty in Broadcasters and Other Media Entrepreneurs.* First, the *ad hoc* development of the policy has had the unintended effect of surrounding certain media transactions with a cloud of uncertainty. In the line of cases from which the policy has evolved the Commission has tried to determine whether particular relationships are "meaningful" and whether the media outlets at issue serve "substantially" the same area. Inconsistencies among these cases render difficult, if not impossible, a definitive determination by broadcasters, in advance of adjudication, as to whether an overlap in service areas is substantial enough or a relationship sufficiently meaningful to warrant regulatory intervention. For example, it is unclear, from an examination of the case law, how the cross-interest policy would be applied to time brokerage arrangements. In one case, the Commission permitted this type of relationship relying, in part, on the large number of radio stations in the market.[41] The Commission indicated that the small percentage of local stations programmed by the same licensee reduced concern that the time brokerage relationship would have a negative effect on the public interest. In another decision, the Commission found no violation of the cross-interest policy even though the time brokerage agreement resulted in one licensee programming the only two night-time radio stations operating in the area during the brokered time period.[42]

28. As commenters assert, the inconsistency in the case law complicates the business planning of inherently complex media transactions. In spite of bona fide efforts to avoid any actual control in another media entity through the use of relationships which are clearly permitted by our cross-ownership rules, broadcasters may unintentionally run afoul of our policy.[43] Further, the fact that the cross-interest policy addresses potential rather than actual harm, together with the absence of a requirement that specific allegations of fact be demonstrated,[44] leave broadcasters particularly vulnerable to cross-interest challenges by competitors, even if groundless. It is, therefore, possible that parties might decide not to enter into a particular relationship merely because of the absence of clear-cut guidelines about whether the relationship would pass muster under the cross-interest policy.[45] In fact, Morgan Stanley asserts ,that there are numerous situations in which unobjectionable relationships will not be undertaken due to uncertainty regarding potential effects of the policy. In short, the policy places burdens on outside sources and on the Commission's resources which must be borne by the public. Even if it is quite likely that the relationship would be approved, the affected parties have no way of reliably predicting that result in advance.[46] Past cases construing the policy afford some general guidance, but do not approach the specificity required for parties to determine, in advance, the propriety of the anticipated relationship. Thus, relationships which might benefit licensees and the public often may be avoided or aborted because of the policy's lack of clarity.[47]

29. *Limitations on Use of Qualified Personnel.* A second burden imposed by the cross-interest policy is that it hinders the ability of media outlets to attract and utilize, in consulting positions, qualified personnel with substantial broadcast experience. Barring contract provisions to the contrary, the absence of the cross-interest policy would permit experts to work at, or have interests in, multiple outlets. This would allow a station to attract and utilize personnel who are cognizant of the requirements of station management and the programming needs and unique characteristics of the particular market. In turn, this may enable a station to increase revenues or decrease costs. The increased profits obtained from such efficiencies could then be recycled into improved programming or facilities, providing more resources to stations suffering from declining revenues and ratings. As a result, a previously unpopular format or station, rather than succumbing to competition, may experience new life and viability in the market through the expertise of a consultant. Thus, the use of qualified personnel, now potentially barred by our cross-interest policy, may "rescue" the station, avoiding a diminution in local diversity and competition.

30. Some would argue that allowing the same person to be employed by two outlets will only contribute to a diminution of diversity and competition. To the contrary, permitting common ownership of media outlets, in certain circumstances, does not detract from diversity of viewpoint but may, in fact, enhance diversity and competition, providing benefits which inure to the public interest.[48] Given the trend towards counterprogramming and narrowcasting, it is reasonable to assume that this same result may occur by permitting broadcast stations to attract and utilize all qualified personnel. Consultants and similar professionals have a clear business incentive to provide advice and assistance that address the individual needs of their clients. Viewed in that light, a consultant will counsel each client station according to its particular situation. For this reason, a consultant serving different broadcasters in the same market might well give each client different advice regarding the type of programming that will effectively maximize its audience. The consultant might recommend, for example, a "top-forty" format to one radio station while advising another competing outlet to use an all news format, thereby stimulating diversity in the market. Furthermore, as a general proposition, freed of the cross-interest policy, broadcasters will have more flexibility to enter into relationships which may strengthen their viability and thus preserve existing levels of diversity of viewpoint and competition. We, therefore, believe it is in the public interest to permit the use of qualified personnel between competing media outlets.

31. *Imposition of Administrative Costs.* A third burden imposed by the continued application of the cross-interest policy results in administrative costs placed upon affected parties as well as the Commission. Such costs could be justified, but only if the review process involved was likely to lead to discovery of significant public interest

concerns not otherwise remediable. Where a potential cross-interest issue is raised, the Commission must review the facts and allegations and determine if a *prima facie* case has been presented under the policy. Where the facts of a case are such that a cross-interest issue is designated for hearing, this process can be even longer and more complex. Often, an individual must go through administrative review in order to show that his proposed relationship does not violate the cross-interest policy.[49] This process is often time consuming and costly to the participants and the Commission. As we recognized in a prior proceeding, even one investigation culminating in a hearing significantly increases the resources required to administer our policies.[50] Further, in addition to the costs of investigation and enforcement, countless staff hours may be spent responding to inquiries relating to the applicability and interpretation of the policy.[51] In view of the lack of benefits involved in continued retention of the policy to address consultancies, advertising agency relationships and time brokerage agreements, the costs of applying the policy to these relationships are unjustifiably high. Given the questionable value of continued oversight of these relationships in the current competitive market, these costs may be reduced, and the public better served, by reliance on methods other than the policy to protect the public interest.

Adequacy of Existing Regulatory Prohibitions

32. We also believe that the need for the existing cross-interest policy has decreased with the adoption of new attribution provisions in the ownership rules that have superceded the cross-interest policy in several respects. Originally, the cross-interest policy was developed to fill the interstices left by the early ownership rules. Since then, we have amended the ownership rules[52] and adopted new attribution provisions[53] to encompass a greater number of relationships that previously were addressed only by the cross-interest policy. At the time the Commission adopted the new attribution rules, we stated that the duopoly and one-to-a-market rules would be applied, in lieu of the policy, "where voting ownership interests at or above the relevant benchmarks [five percent stock ownership or officers or directors] are involved."[54] Thus, for example, cross directorships and substantial minority interests, which, until amendment of the ownership rules only fell within the purview of the policy, are now expressly covered by these rules.

33. In developing the local ownership rules, in the 1940s, and modifying the scope of our attribution provisions in the 1980s, the Commission identified those relationships which were of genuine concern because of their potential for abuse. We concluded that ownership of five percent or more of a station's stock or a position as an officer or director of a licensee were situations which would be deemed attributable for purposes of the multiple ownership rule.[55] Conversely, nonvoting stockholders and limited partners, we decided, do not take part in control and, therefore, would not be considered attributable for the purposes of the ownership rules.[56] These actions reflected our informed policy judgment on the types of relationships which would detrimentally affect diversity and competition and should, therefore, be restricted in order to promote the public interest.[57] As for CFA/TRAC's argument that our reliance on the multiple ownership rules is misplaced because we are proposing to repeal those rules,[58] we think it is sufficient to note that our recent decisions only modestly revised the duopoly and one-to-a-market rules.[59]

34. Further reducing our concern with respect to the need for the existing cross-interest policy are remedies, in the form of federal and state antitrust laws, which may be available to reduce or deter potential anticompetitive consequences which the cross-interest policy is designed to curb. Antitrust analysis will take into account the market sizes and the number of competitors when determining if a violation has occurred. The potential for anti-competitive consequences perceived to be present in such relationships as consulting agreements, time brokerage arrangements, and relationships involving advertising agencies is reduced by the presence of these laws. The existence of such laws and remedies has supported modification or elimination of other rules and policies.[60] To the extent that they reduce anticompetitive effects, these remedies may also have an ancillary effect which, in conjunction with the substantial market growth, discussed *supra* paras. 21 - 25, reduces our concern over diversity. We believe that reliance on such alternative forms of deterrence will more effectively serve the public interest and preclude the need for a stringent policy to insure against anticompetitive consequences.[61]

35. Also, contractual arrangements into which the parties enter may provide further protection from anticompetitive activity. For example, the improper use of consultants or advertising agencies could conceivably give rise to a cause of action for breach of contract. Alternatively, such actions might give rise to a breach of a fiduciary duty imposed by either the contracting party or by the entity with which the cross-interest relationship exists. Further, a station that wishes to hire a consultant may insert into the terms of the contract a provision to require that any confidential business information obtained during the consultancy period not be disclosed to a rival station for which the consultant also worked.[62] Similarly, contracts can protect stations in situations in which an advertising agency with a cross-interest in one station in a market contracts to purchase time on competing stations. As part of the contractual relationship, a client may require the agency to spread advertising among competing stations in order to reach a larger audience or a broader demographic base. Thus, if the agency favors the station with which it shares a common interest by directing advertisers exclusively to that station, an action for breach of contract may lie. Notwithstanding the legal remedies available, the harm to the reputation of one who breaches these types of contractual requirements acts as a strong incentive to conduct themselves in a forthright manner. The existence of these alternative prohibitions further reduces our concern that permitting cross-interest relationships will result in harm to the public interest.

SUMMARY

36. *Consulting Positions and Advertising Agencies.* The vast changes in the media marketplace reduce our concern that these interests will result in harm to the public interest. Current market conditions require consultants and advertising agencies to represent clients vigorously in order to remain competitive. Thus, it would not avail representatives to favor one client over any other. Our concern with the possible anticompetitive effects of these interests is further attenuated by the availability of alter-

native methods to prevent and remedy abuses. Specifically, contract provisions can create enhanced duties of care, confidentiality requirements, or affirmative obligations in the method of conducting business. These agreements can protect the rights of the parties as well as deter anticompetitive conduct. In the event of abuse, less speculative remedies are available in the form of federal and state antitrust laws or, if the relationship is contractual, an action for breach. These alternatives serve both deterrent and remedial purposes and will address actual abuses, should they occur, rather than circumscribe potentially beneficial relationships in an effort to prevent speculative abuses.

37. *Time Brokerage Arrangements*. The substantial increase in media outlets, and the corresponding increase in diversity and competition, since the implementation of the cross-interest policy, reduces the need to prohibit time brokerage arrangements to protect the public interest. Competitive conditions require a station that decides to broker its time to another to remain alert to the needs of its audience or risk losing some of that audience to a competitor, with a resultant decrease in ratings and revenue. Thus, the amount of choice available to listeners and viewers insures that competition will be vigorous in order for a station to retain its share of the audience. Should an anticompetitive arrangement occur, the antitrust laws are equally applicable to remedy this situation as they are to remedy abuse of relationships involving consulting positions and advertising agencies. Moreover, since a licensee entering into a time brokerage arrangement must continue to maintain control over its programming, the fact that some of its programming may be provided by another station in the market does not raise the same viewpoint diversity questions that may be raised if stations in the market were under common ownership or shared key employees.

38. Our decision to narrow the scope of the cross-interest policy is further based on the fact that revisions to the attribution rules now directly address a number of interests previously limited only by the policy. Moreover, our action here will reduce the number of *ad hoc* determinations required, thus making it easier for broadcasters and others to determine when a relationship will be circumscribed. This will, in turn, reduce the chilling effect on potentially beneficial relationships because of the lack of specificity on which to base a determination whether the relationship will ultimately be permitted.

39. In our view, wherever feasible it is more efficient and effective to confront whatever cross-interest problems arise by applying the various remedies (*e.g.*, breach of contract and federal and state antitrust provisions) which are designed to discourage activities that may be inimical to the welfare of the public. Our present policy ignores the fact that every cross-interest covered by the policy is not certain to harm the public, in fact, we conclude that some might be beneficial. We will thus allow parties affected by particular cross-interests and, as to antitrust issues, the Justice Department and the Federal Trade Commission, to identify and take appropriate action as those cross-interests emerge.

40. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval of the Office of Management and Budget as prescribed by the Act.

41. Accordingly, IT IS ORDERED, THAT the cross-interest policy, except as applied to joint ventures, key employee relationships, and nonattributable equity interests as discussed herein, IS ELIMINATED effective **April 6, 1989.**

42. Authority for the policy decisions herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

43. For further information on this proceeding contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Reexamination of the Commission's Cross - Interest Policy*, 2 FCC Rcd 3699 (1987).

[2] *Id.* at 3702.

[3] As indicated above, our inquiry also included examination of our cross-interest policy as it relates to joint ventures, key employee relationships, and nonattributable equity interests. In order to develop a fuller record, however, we are issuing a separate notice requesting additional comment on these issues.

[4] In addition to determining what constitutes a "meaningful" cross-interest, it is also necessary to ascertain when media outlets serve substantially the same area. Generally, the policy applies to stations or media outlets located in the same community or substantially in the same market. *See, e.g., Farmville Broadcasting Co.*, 47 FCC 2d 463, 464 (1974); *Guy S. Erway*, 90 FCC 2d 750, 752 (Rev. Bd. 1980). The cross-interest policy has not been applied, however, in situations that merely involve a minimal overlap of the 1 mV/m contours of the stations because such stations are not considered to be in the same market. *See, e.g., United Community Enterprises, Inc.*, 37 FCC 2d 953 (Rev. Bd. 1972).

[5] Consultants, as distinguished from key employees, usually involve relationships with the licensee that are limited in duration and scope and generally confined to providing advice, which can either be accepted or rejected by the licensee. In general, consultants are not considered, and hence do not serve, as "employees" of the licensee but rather as independent contractors who are hired for their expertise in one or a number of areas. For example, a consultant may be hired to prepare audience surveys and, based on these surveys, report findings and recommend a course of action. Thus, while consultants may be engaged by licensees to make findings and recommendations regarding aspects of a station's management, operations or direction, they would not have the final say as to whether the recommendations should be implemented. Rather, such matters would usually be undertaken by officers or directors of the licensee.

[6] *See, e.g., Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973); *Guy S. Erway*, 90 FCC 2d at 750.

[7] *WCVL, Inc.*, 55 FCC 2d 879 (1975); *Station WWSM*, 31 FCC 2d 584 (1971).

[8] *Eastern Broadcasting Corp.*, 30 FCC 2d 745 (Rev. Bd. 1971) (specific allegations of fact were sufficient to raise questions as to whether applicant's interest in an advertising agency and proposed broadcast station serving the same area were contrary to the public interest). *Cf. Atlantic Broadcasting Co. (WUST)*, 5 FCC 2d 717 (1966) (cross-interest issue not warranted because of absence of specific allegations of fact that the interest would be contrary to the public interest).

[9] The "duopoly" rule currently prohibits the common ownership, operation, or control of two commercial broadcast stations in the same broadcast service which serve the same local area. It accomplishes this goal by prohibiting the overlap of the 3.16 mV/m contours of commonly-owned FM stations, the 5 mV/m contours of commonly-owned AM stations, or the Grade B contours of commonly-owned television stations. *See* 47 C.F.R. § 73.3555(a) (1986). The duopoly rule, as well as the one-to-a-market rule (47 C.F.R. § 73.3555(b) (1987)), *see infra* note 19, have recently been reexamined in a separate proceeding. *See Amendment of Section 73. 3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, _____ FCC Rcd _____ (1988) (*First Report and Order* in MM Docket No. 87-7, adopted October 27, 1988) (Radio Duopoly Rule). *Amendment of Section 73. 3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, _____ FCC _____ Rcd (1988) (*Second Report and Order* in MM Docket No. 87-7, adopted December 12, 1988) (One-to-a-Market-Rule).

[10] *Rules Governing Standard and High Frequency Broadcast Stations*, 5 Fed. Reg 2,382, 2,384 (1940) (FM and Television Duopoly); *Rules Governing Standard and High Frequency Broadcast Stations*, 8 Fed Reg. 16,065 (1943) (AM Duopoly).

[11] *See, e.g., Radio Athens, Inc., (WATH) v. FCC*, 401 F.2d 398 (D.C. Cir. 1968).

[12] *See Minnesota Broadcasting Corp.*, 13 FCC 672 (1949). *See also Macon Broadcasting Co.*, 10 FCC 444 (1945), in which the Commission conditioned its grant of a construction permit for a new AM station upon the applicants' two majority shareholders divesting themselves of "any connection" with a competing AM station in the same community.

[13] *Shenandoah Life Insurance Co.*, 19 RR 1 (1959). The cross-interests addressed in both *Minnesota Broadcasting* and *Shenandoah Life Insurance* are now prohibited by our local ownership rules.

[14] *Id.* at 2.

[15] *Compare Minnesota Broadcasting Corp*, 13 FCC at 672 (singular purpose of economic competition) *with United Community Enterprises, Inc.*, 37 FCC 2d at 953 (dual purpose of economic competition and diversity of viewpoint).

[16] *Golden West Broadcasters*, 16 FCC 2d 918 (1969).

[17] *Golden West Policy*, 87 FCC 2d 668 (1981) (*Report and Order* in BC Docket No. 80-438).

[18] These rules, described below, including the duopoly rule, will be collectively referred to hereinafter as "the local ownership rules."

[19] *See*, e.g., *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *rev. denied*, FCC 83-235 (released May 18, 1983), *affirmed sub nom. Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) (radio-television cross-interest case). Unlike the "duopoly" rule, the "one-to-a-market" rule restricts common ownership between commercial stations in different broadcast services. In essence, it restricts a party to one AM-FM combination or one television station in a market. *See* 47 C.F.R. § 73.3555(b) (1986).

[20] The broadcast/newspaper cross-ownership rule prohibits common interests in a broadcast station and a daily newspaper if the broadcast station's relevant service contour would encompass the entire community in which such newspaper is published. *See* 47 C.F.R. § 73.3555(c) (1986). *See Wisconsin Television, Ltd.*, 59 RR 2d 193 (1985) (television-newspaper cross-interest case). Although recent appropriations legislation circumscribes Commission authority in the area of newspaper cross-ownership, the legislation is inapplicable to the non-attributable relationships discussed herein. *See Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459 (signed October 1, 1988).

[21] *News International, PLC*, 97 FCC 2d 349, 367-71 (1984) (cross-interests between cable television systems and television stations in same market). The cable/broadcast cross-ownership rule prohibits, *inter alia*, the common ownership of a cable television system and a television broadcast station whose predicted Grade B contour covers any portion of the service area of the cable television system. *See* 47 C.F.R. § 76.501(a)(2) (1986). This provision of the cable/broadcast cross-ownership rule was recently codified in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(a) (Supp. II 1984)).

[22] For example, even though the multiple ownership rules permit the common ownership of colocated commercial AM and FM stations, the cross-interest policy has been invoked where cross-interests exist between separately controlled AM and FM stations in the same market. *See, e.g., Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973).

[23] The attribution provisions are contained in notes appended to the local ownership rules and, in essence, constitute the means by which the local ownership rules are implemented. Currently, they provide that, *inter alia*, partnership and direct ownership interests of voting stock of five percent or more will be cognizable as ownership interests significant enough to invoke the rule. They also provide that officers and directors of a licensee are positions which entail an amount of control great enough to require prohibition under the rule. 47 C.F.R. § 73.3555, Note 2(a) (1986). Exempted from attributable interest are passive investor interests under ten per cent, holders of nonvoting stock, limited partners and certain officers and directors who certify that they are not materially involved in the management or operation of the licensee. 47 C.F.R. § 73.3555, Note 2(c), (f), (g)(1), and (h) (1986).

[24] *Amendment of the Multiple Ownership Rules*, 18 FCC 288 (1953).

[25] *See* 47 C.F.R. §§ 73.3555, 76.501, Notes 1, 2 (1986).

[26] *See Attribution of Ownership Interests*, 97 FCC 2d at 999 n.4.

[27] Comments supporting elimination of the cross-interest policy were filed by the National Association of Broadcasters (NAB), Westinghouse Broadcasting, Inc. (Group W), Morgan Stanley & Co., Inc. (Morgan Stanley), and Cox Enterprises, Inc. (Cox). London Bridge Broadcasting, Inc. (London Bridge) filed comments which generally support elimination of the cross-interest policy except as it applies to key employee positions. Comments opposing elimination of the policy were filed jointly by the Consumer Federation of America and Telecommunications Research and Action Center (CFA/TRAC). Amherst Broadcasting, Inc. (ABI), in a reply to the comments of NAB, opposed elimination of the policy. To the extent these comments and reply comments address the subject of cross-interests involving key

employees nonattributable equity interests or joint ventures, they will be incorporated by reference in the record of the new proceeding instituted today.

[28] *Amendment of Section* 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, 2 FCC Rcd 1138 (1987) *(Notice of Proposed Rulemaking in* MM Docket No. 87-7).

[29] 47 C.F.R. § 73.3555(b) (1986).

[30] As stated earlier, exempted from this policy statement shall be cross-interests involving certain joint ventures not otherwise addressed by the attribution rules, key employees, and certain nonattributable equity interests. Subject to the outcome of our Further Notice of Inquiry/Notice of Proposed Rulemaking, these cross-interests will continue to be subject to review.

[31] In 1950 there were 2,302 AM, 732 FM, and 109 television stations. *Sixteenth Annual Report of the Federal Communications Commission - FY 1950,* at 102. The 1988 station totals are based on Commission records as of October 31, 1988, which indicate that there are 4,923 AM, 54930 FM, and 1,791 television stations.

[32] *See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments,* 94 FCC 2d 152 (1983) *(Report and Order* in BC Docket No. 80-90), *recon. denied,* 97 FCC 2d 279 (1984); *see also FM Broadcast Assignments,* 100 FCC 2d 1332, 1340-1379 (1985) (implementation of BC Docket No. 80-90) (the Commission established 689 new commercial FM allotments, the majority of which are in medium and small radio markets, and created three new classes of FM channels); *Preparation for an International Telecommunication Union Region 2 Administrative Radio Conference for the Planning of Broadcasting in the 1605 - 1705 kHz Band,* 50 Fed. Reg. 33,844 (1985) (First Report in Gen. Docket No. 84-467); Preparation for an International Telecommunication Union Region 2 Administrative Radio Conference for the Planning of Broadcasting in the 1605 - 1705 kHz B and, 51 Fed. Reg. 8,706 (1986) (Second Report in Gen. Docket No. 84-467) (international agreement provides for more spectrum use by AM radio service, potentially stimulating a significant number of new AM stations in the future).

[33] The number of cable television systems has increased from 300 in 1954 to about 8,000 in 1987. *See Twentieth Annual Report of the Federal Communications Commission - FY 1954,* at 90. Of all television households, 79% are passed by cable television systems. "Cable Stats," *Cable Vision,* Aug 31, 1987, at 88. Approximately 49.5% of all television households subscribe to cable. Nielsen Media Research estimate, quoted in "July Numbers," *Broadcasting,* Sept 21, 1987, at 78. Currently, there are about 410 licensed LPTV stations, and we estimate that this service may ultimately increase by an additional 4,000 stations. *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees,* 102 FCC 2d 143, 212 (1985). The percentage of television households with VCRs has increased from 19% in 1984 to 48.7% in 1987. *See* A.C. Nielsen estimate, quoted in Comments of NAB, "An Analysis of Media Outlets by Market" (NAB Media Outlet Study), Appendix B at 1 (June 1987), filed in MM Docket 87-7, which NAB incorporates by reference in comments filed in the current proceeding. See Comments of NAB at 8 n.16 (July 1987) (MM Docket No. 87-154).

[34] As of June 30, 1986, MDS systems reached approximately 260,690 subscribers and estimates suggest the number of subscribers could reach more than nine million. Paul Kagan Associates, Inc., *Multicast Newsletter,* No. 322, November 10, 1986.

[35] NAB Media Outlet Study, *supra* note 33.

[36] *Id.* at Figure 1.

[37] *Id.* at Figure III.

[38] *Id.* at Figure 6.

[39] Comments of Cox Enterprises at 10.

[40] *Second Report and Order in Re Elimination of Unnecessary Broadcast Regulation,* 59 RR 2d 1500, 1517 (1986) (MM Docket No. 83-842).

[41] *Dual-Language TV/FM Programming in Puerto Rico,* 33 RR 2d 515 (1975).

[42] *Station WWSM,* 31 FCC 2d 584 (1971).

[43] *See* Comments of Morgan Stanley at 5-11.

[44] *Cleveland Television Corp.,* 732 F.2d at 970.

[45] *See* Comments of Morgan Stanley at 11-12.

[46] For example, although the Commission intended to apply the cross-interest policy to ownership interests in newspapers, *see Multiple Ownership,* 50 FCC 2d 1046, 1076-77 (1975), the Commission declined to do so when it approved a transfer which resulted in a nonattributable stock interest in the licensee of a television station being held by the owner of a daily newspaper which served the sam market. *Evening Star Broadcasting Co.,* 68 FCC 2d 129 (1978). Although the Commission discussed the impact on competition in that case, the cross-interest policy was not invoked to ban the transaction.

[47] We recognize that vagueness is not fatal to the cross-interest policy. However, even if the policy were clarified in an effort to cure this uncertainty, our decision to delete the policy, for the reasons stated herein, would not be altered.

[48] *Amendment of Section 73.3555 of the Commission's Rules, the BroadcastMultiple Ownership Rules,* _____ *FCC Record* _____ *(1988) (Second Report and Order* in MM Docket No. 87-7, adopted December 12, 1988) ¶¶ 51-64. *See also* P. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting,* 66 Quarterly J. Economics 194; FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation,* Volume I, at 365-66.

[49] *See, e.g., Metromedia Broadcasting Corporation,* 1 FCC Rcd 1022 (1986); *Wisconsin Television, Ltd.,* 102 FCC 2d at 1001.

[50] *Elimination of Unnecessary Broadcast Regulation,* 59 RR 2d at 1509.

[51] ABI argues that these administrative burdens can be minimized by applying the policy only on an "as needed" basis where it is necessary to ensure free competition. This approach, however, would in no way preclude the need for case-by-case adjudication and might further complicate the process by requiring the Commission to make findings or establish guidelines as to when the policy should be invoked.

[52] *Amendment of the Multiple Ownership Rules,* 18 FCC 288 (1953).

[53] *See Attribution of Ownership Interests,* 97 FCC 2d at 1032-33.

[54] *Id.* at 999 n.4 (parenthetical statement added).

[55] *Id.* at 1025.

[56] *Id.* at 1020, 1022.

[57] At the time of modifying the attribution provisions, we stated that "[t]he attribution rules . . . are designed to measure what ownership interests will confer that amount of influence or control which must be limited." The scope of that proceeding, however, did not encompass the cross-interest policy, which addresses business relationships of broadcasters that do not rise to the level of attributable interests. Therefore, we did not revisit in that Rule Making whether the relationships covered by the cross-interest policy continued to confer sufficient influence or control to warrant limitations comparable to those governing attributable interests. Although we stated that the attribution Rule Making proceeding was not intended to affect

the cross-interest policy and that the policy would continue to be applied except where, as a practical matter, it overlapped with specific provisions of the new attribution rules, *see id.* at 1000 n.4, it was not our intent to foreclose reexamination of the continued validity and effectiveness of the cross-interest policy. We note that any relationship covered by the cross-interest policy that is deemed to pose a serious threat to viewpoint diversity or competition, should be treated, if possible, as an attributable interest under the local ownership rules rather than subjecting it to *ad hoc* review as is our current practice. As noted previously, we are inviting further comment with respect to the appropriate regulatory treatment of key employees and certain joint ventures and nonattributable equity interests in a separate proceeding. With respect to nonattributable equity interests and joint ventures, however, if we decide in our separate proceeding that they require continued oversight, it may not be possible to incorporate them in the ownership rules. The multiplicity of possible relationships makes it difficult to forecast definitively all the relationships which threaten diversity or competition. Thus, should we decide at the conclusion of our separate proceeding that these interests continue to warrant Commission scrutiny, our current ad hoc review may be necessary for such interests. We would nonetheless like to develop, if possible, any guidelines that might identify, at least in general terms, those nonattributable equity and other interests that require continued oversight to minimize uncertainty caused by continued case-by-case review.

[58] *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 2 FCC Rcd 1138 (1988) (*Notice of Proposed Rulemaking* in MM Docket No. 87-7).

[59] See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, FCC _____ Rcd _____ (1988) (*First Report and Order* in MM Docket No. 87-7, adopted October 27, 1988) (Radio Duopoly Rule); Amendment of Section 73.3555 of the Commission's Rules, the BroadcastMultiple Ownership Rules, FCC Rcd (1988) (Second Report and Order in MM Docket No. 87-7, adopted December 12, 1988) (One-to-a-Market-Rule). These decisions were adopted concurrent with, or shortly after, the Commission adopted the instant Policy Statement, but prior to its release.

[60] *See, e.g., Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d at 1500; *Golden West Policy*, 87 FCC 2d at 668.

[61] The fact that broadcasters are subject to federal licensing and regulation, of course, does not immunize them from antitrust oversight. In this regard, we note that, in addition to possible governmental enforcement actions in this area, the private parties injured by federal antitrust law violations are entitled to bring a private action for treble damages against the defendant. Clayton Act, ch 323, § 4, 38 Stat. 731 (1914)(15 U.S.C. § 15 (1982)).

[62] In fact, it is within the discretion of the licensee, prior to retaining a consultant, to require disclosure of the consultant's other media interests, permitting the licensee to make an informed judgment regarding possible conflicts of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS and WATS Market Structure:
Average Schedule Companies

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 1989; Released: March 9, 1989

By the Commission:

1. By an Order released February 5, 1988, the United States Court of Appeals for the District of Columbia Circuit remanded to this Commission for further consideration Section 69.605(c)(1) of our Rules, 47 C.F.R. § 69.605(c)(1).[1] That rule, adopted as part of our comprehensive access charge plan, established certain eligibility criteria for average schedule treatment for local exchange carriers (LECs). The rule provides that:

> (1) After December 31, 1985, any company that directly or indirectly controls, is directly or indirectly controlled by, is under direct or indirect control with, or merges with a telephone company that did not participate in average schedule settlements on December 1, 1982, shall not be deemed to be an average schedule company except that this provision shall not apply to affiliated exchange carriers that collectively have less than forty million dollars in annual operating revenues.

2. In *ALLTEL* the Court found that we had "failed to supply a reasoned basis for [the] average schedule eligibility rule and that, absent such a basis, the average schedule rule is arbitrary with or without the exception for companies affiliated with groups of a certain size." *ALLTEL*, 838 F.2d at 563. Accordingly, the Court remanded this proceeding to us for further proceedings consistent with its opinion. We conclude that, on the basis of the record compiled in this proceeding to date, the most appropriate response to the Court's mandate at this time is to repeal Section 69.605(c)(1) of our Rules.[2]

3. Accordingly, IT IS ORDERED that Part 69 of this Commission's Rules, 47 C.F.R. Part 69, IS AMENDED as set forth in the Appendix below, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C. F. R. Part 69 is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.605 is amended by removing paragraphs (c) (1) and (c)(2) and revising paragraph (c) to read as follows:

§ 69.605 Reporting and distribution of pool access revenues.

* * * * *

(c) Except as provided in paragraph (b) of this section, payments to average schedule companies that are computed in accordance with § 69.606 shall be disbursed before any other funds are disbursed. For purposes of this part, a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company except that any company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company.

* * * * *

FOOTNOTES

[1] ALLTEL Corp. v. FCC, 838 F.2d 551 (D.C. Cir. 1988) (*ALLTEL*).

[2] We do not by this action, of course, preclude consideration of this issue at some later point.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION AND WORLD COMMUNICATIONS, INC. File No. ENF-88-18

Application for Consent to Assignment of Commission Authorizations

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1989; Released: March 9, 1989

By the Chief, Common Carrier Bureau:

1. By application filed pursuant to Section 34 of the Submarine Cable Landing Act and Section 214 of the Communications Act of 1934, 47 U.S.C. §§ 34-39, 214 (1986), and Part 63 of the Commission's Rules, 47 C.F.R. §§ 63.01-63.702 (1987), Western Union Corporation (WUC) and World Communications, Inc. (WorldCom) have sought consent to transfer from WUC to WorldCom cable landing rights and Title II international authorizations under which Western Union World Communications Inc. (WUWC), a WUC subsidiary, currently operates facilities for the provision of international private line communications services (IPLS). This proposed transfer of cable landing rights and Title II international authorizations is required as a consequence of a business restructuring involving the sale of the IPLS business of WUC, to WorldCom. A Petition to Deny was timely filed by Pan American Satellite (PAS), and a letter containing comments, not purporting to be a petition to deny, was filed by MCI Communications Corporation (MCI). Oppositions to the Petition to Deny were filed by WUC and WorldCom.

I. BACKGROUND

2. WUC is a corporation organized under the laws of the state of New York. WUC provides a wide variety of domestic and international telecommunications services to the public over its owned and leased terrestrial and satellite facilities. The majority of WUC's operations involve the provision of domestic telecommunications services. WUC has experienced severe financial problems in recent years. In 1987, the Commission permitted a new management group to acquire WUC and ITT World Communications Inc., and to merge them into a single company.[1] This transaction was designed to make WUC a more viable competitor. WUC's current business plan focuses its resources on its non-facilities-based activities.[2] The instant transfer of WUC's IPLS business is another step in WUC's overall financial restructuring plan. [3]

3. WUWC is a Delaware corporation and wholly-owned subsidiary of WUC.[4] WUWC's business consists mainly of the provision of international telecommunications services. In addition to its IPLS business, WUWC provides international telex and telegram services. The IPLS business consists of providing customers with international dedicated circuits for the high volume transmission of voice and data over analog and digital submarine cable and satellite facilities. WUWC is currently classified as a non-dominant carrier by the Commission, and is subject to streamlined regulation.[5] WUWC holds Title II Section 214 authorizations, cable landing rights, and common carrier radio licenses subject to Title III. WUWC's radio licenses are not a subject of the instant Application, since these will be retained by WUC and operated pursuant to contract with carriers other than WUC, with the exception of IPLS satellite earth station services, which WorldCom will obtain from WUC for a temporary period. Pursuant to authority granted in the Commission's 1987 Order, WUWC will be merged into WUC prior to the completion of the IPLS transfer.[6]

4. WorldCom is a New York corporation, formed to acquire and operate the IPLS business that is the subject of the instant Application. Worldcom will provide continuity of operation of this IPLS business, which was established over a hundred years ago and operated by ITT Corporation, and subsequently by WUC. Following the proposed transfer, WorldCom states that it will continue to operate the IPLS business with the existing management and employees, with such additions as may be warranted.[7]

5. WorldCom, the proposed IPLS transferee, is a wholly-owned subsidiary of Tele-Columbus USA, Inc. (T-C USA), a Delaware corporation. Tele-Columbus USA, Inc. is a wholly-owned subsidiary of Tele-Columbus, AG (T-C AG), which is a wholly-owned subsidiary of Motor-Columbus, AG (M-C AG), the latter two being business entities organized under the laws of Switzerland. T-C USA, T-C AG, and M-C AG are holding companies, which conduct their activities through operating companies, such as WorldCom.[8] According to the Application of WorldCom, United States citizens will constitute a majority of the members of the Boards of Directors of WorldCom and T-C USA.[9] The stock of M-C AG is publicly-traded on Swiss stock exchanges. In 1987, M-C AG had over one billion dollars in revenues, and owned over 300 million dollars in assets. Its activities encompass energy, technology, and finance.[10]

6. T-C AG engages in the design, construction, financing, and operation of cable television systems in Europe, primarily in Switzerland, the Federal Republic of Germany, and France. It provides database retrieval services in Switzerland and throughout Europe, customized applications software, information engineering and consulting services in Europe, and it develops data security systems in Switzerland and the Federal Republic. In addition to its ownership of WorldCom, T-C USA owns a 24.32% interest in Houston International Teleport, Inc.[11]

II. CONTENTIONS OF THE PARTIES.

7. The Petition to Deny of PAS states that the application of WUC and WorldCom is lacking information sufficient to allow the Commission to make an informed decision, and that, consequently, the application should be denied until the information deemed to be missing is supplied.[12] PAS notes that WorldCom's ultimate parent is Motor-Columbus, AG, a foreign entity organized under the laws of Switzerland, which is engaged in providing "cable television and other communications services in

Europe".[13] PAS alleges that it is Commission policy to automatically subject a foreign-owned carrier to regulation as a "dominant carrier", citing International Competitive Carrier Policies, CC Docket No. 85-107, 102 FCC. 2d 812, (1985), 820-23, 842-43 (1985), *recon.*, FCC 86-309 (released Aug. 7, 1986), 60 R.R.2d 1435 (1986). PAS states that although the application states that Motor-Columbus is not a foreign telecommunications entity[14] the application does not reveal whether any of Motor-Columbus' principle shareholders are foreign telecommunications entities. Similarly, according to PAS, the application does not disclose whether any employee, agent, or representative of a foreign telecommunications entity will be a director of WorldCom. PAS states that since the foregoing information does not appear in the application, the Commission is unable to determine the public interest issues involved in granting the application.

8. The comments of MCI take the position that it "does not oppose the instant application", and does not seek rejection of the application "provided that Worldcom, consistent with Commission policy, is afforded the status of a dominant international common carrier due to its foreign ownership." MCI goes on to state that while certain issues relating to foreign ownership do not appear to pose significant problems in this context, these could raise "critical competitive concerns in other factual contexts".[15] MCI states that one should recognize that anticompetitive influence can be exerted even when a foreign owner of a domestic telecommunications carrier is not a common carrier or telecommunications administration. MCI refers to potential issues such as reciprocal buying, but states that the affiliation in the proposed transfer does not appear to pose "any significant threat to competition".[16]

9. The Opposition to Petition to Deny and Comment filed by WUC states that the petition to deny raises no public interest reason why the subject application should not be granted, but only raises the question whether the transferee of authority should be regulated as a dominant or non-dominant international carrier.[17] WUC recites the Commission test to be applied to determine if a carrier is dominant: a) if a domestic common carrier possesses market power, or b) if a domestic carrier is foreign-owned, which is defined to mean a carrier which is over 15% directly or indirectly foreign owned by a telecommunications entity or on whose board of directors an employee, agent, or representative of a foreign telecommunications entity sits.[18] As a factual matter, WUC states that neither Motor-Columbus, AG nor any of its affiliated companies offer "telecommunications" services, but rather, that it offers consulting services and operates a database retrieval service, neither of which activities are considered by the Commission to be telecommunications services.[19] Moreover, no representative of any foreign telecommunications company will be seated on WorldCom's Board of Directors.[20]

III. DISCUSSION

10. A review of the record shows that the issues raised on the pleadings do not demonstrate any public interest basis for denying the instant application. The critical factors in support of granting the application are apparent on the record. First, the IPLS business of WUC will be continued in substantially the same form in the hands of the transferee. The realignment will be directed toward making the resulting domestic operations of WUC and the spun-off international operations (consisting of the IPLS business transfered to WorldCom) more focused, possibly more efficient, and more competitive in their respective markets. The transfer in effect gives the IPLS business of WUC access to a new source of investment capital, which can be expected to strengthen the competitiveness of the business. As noted, the effect of the transfer will be to counteract a current tendency of increasing concentration in the international record carrier business.[21] Currently, there are three international record carriers in the international market, down from six in 1987.[22] The advent of WorldCom will raise this number to four, even though WorldCom will be active only in the international private line segment of the non-IMTS international telecommunications market. Thus the proposed transaction encourages the maintenance of competition in this line of business.[23]

11. In addition to our regulatory review under the Communications Act, we are charged with the responsibility of reviewing the proposed transfers of authority in light of the provisions of Section 7 of the Clayton Act.[24] Section 7 proscribes the acquisition of the stock, other share capital, or assets of a company by another company where the effect may be to lessen competition substantially or tend to create a monopoly in any line of commerce. In 1987, the Commission approved the acquisition of WUC and ITT World Communications Inc. by a newly-constituted management group, and the merger of these two companies into a single company, as a response to severe financial difficulties which WUC had experienced in recent years, and in an effort to restore WUC as a viable, financially strengthened competitor.[25] Pursuant to that Commission approval, WUC acquired all of the stock of ITT World Communications Inc., and changed its name to Western Union World Communications Inc. Prior to the completion of the instant sale of the IPLS business, WUWC will be fully merged into WUC.[26] Thus, the overall restructuring and realignment, of which the instant transfer of WUC's IPLS business is an incidental part, is a pro-competitive realignment. The IPLS transfer itself is consistent with this pro-competitive direction in that its purpose is to allow WUC to divest itself of this particular facilities-based international business, to allow it to focus and concentrate its resources more effectively on its domestic, non-facilities-based activities.[27] The transfer of the WUC IPLS business itself will not lessen competition, nor will it increase concentration, running counter, as shown above, to the recent tendency toward increased compaction of the number of competitors in the international record carrier business. Thus, our Clayton Act review does not indicate that the proposed transfer of WUC's IPLS business to WorldCom, in substantially intact and unchanged form, will in any way substantially lessen competition or tend to create a monopoly in any line of commerce.

12. The financial difficulties which threaten the domestic competitiveness of WUC lead to the conclusion that the public interest will best be served by an expeditious resolution of any regulatory impediments to the business realignment which depends on a granting of the instant application for transfer of cable landing licenses and Section 214 Title II authorities. As noted in the Oppositions of WorldCom and WUC, the objections of MCI and PAS to the instant WUC IPLS transfer to WorldCom go only to the issue of the level of regulatory oversight to be applied to WorldCom on completion of the transaction, and not to the issue whether the transaction per se is in

the public interest.[28] The only substantial issue raised by the pleadings filed by MCI and PAS is the proper characterization of WorldCom as a dominant or a non-dominant carrier for purposes of applying full regulation as to facilities authorization, tariffing, and other matters, or streamlined regulation, respectively. This issue, as observed by WUC and WorldCom, is not intrinsic to the grant of the transfer application, absent other public interest issues. Rather, as MCI suggests, any competitive issues that may remain can be best addressed by the treatment of WorldCom as a dominant carrier for all international common carrier services originating or terminating in the United States. We conclude that this determination is fully consistent with the evidence and the Commission's international competitive carrier policies.[29]

13. As part of our statutory review process, we are required, pursuant to the provisions of the Cable Landing License Act[30] and Executive Order No. 10530 (May 11, 1954) to obtain an assessment and advice as to the approval of the proposed transfer of control of the subject submarine cable landing licenses, from the U.S. Department of State. By letter dated January 12, 1989, the Department of State has indicated that, subject to the condition that it would be able to raise with the Commission "any aspect of the ensuing arrangement as may in [its] judgment impinge adversely on critical United States Government activities", it had no objection to the proposed sale, and "specifically approves the transfer of control of the affected cable landing licenses". The Department indicates further that "[t]his approval has been coordinated with the cognizant Executive Branch agencies.[31]

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 34 of the Submarine Cable Landing Act, 47 U.S.C. § 34, Section 214 of the Communications Act of 1934, 47 U.S.C. §§ 34-39, 214, Part 63 of the Commission's Rules, and authority delegated by Section 0.291 of the Commission's Rules, 47 U.S.C. § 0.291, that the Application for Consent to Assignment of Commission Authorizations of Western Union Corporation and World Communications, Inc., from Western Union World Communications, Inc., to World Communications, Inc., is granted as described above.

15. IT IS FURTHER ORDERED that this grant is subject to the condition that WorldCom will be classified as dominant in its provision of international common carrier services absent an express determination by the Commission that WorldCom is nondominant.

16. IT IS FURTHER ORDERED that the grant is subject to the condition that WorldCom must file Section 214 applications with the Commission before it can add additional circuits to provide facilities-based international common carrier services that originate or terminate in the United States.

17. IT IS FURTHER ORDERED that the grant is subject to the condition that WorldCom file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter and that WorldCom file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

18. IT IS FURTHER ORDERED that the grant is subject to the condition that WorldCom file any operating agreement entered into by itself or its parent/affiliate that affects traffic and revenue flows to or from the United States within 30 days of its execution.

19. IT IS FURTHER ORDERED that WorldCom must file annual traffic and revenue reports as provided for in CC Docket 86-494 concerning traffic originating or terminating within the United States.

20. IT IS FURTHER ORDERED that the grant is subject to the condition that WorldCom file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for international services originating or terminating in the United States.

21. IT IS FURTHER ORDERED that the petition to deny filed by PAS is granted to the extent discussed herein and otherwise DENIED.

22. It is FURTHER ORDERED that this Order is EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Western Union Corporation, 2 FCC Rcd 6063 (1987).

[2] Application of WUC and WorldCom, at 4.

[3] *Id.*

[4] Consistent with Commission authorizations granted in Western Union Corporation, *supra*, WUC acquired all of the stock of ITT World Communications, Inc., and renamed the company WUWC.

[5] Application, at 5. *See* International Competitive Carrier Policies, 102 F.C.C. 2d 812 (1985).

[6] Application, at 6.

[7] *Id.*

[8] *Id.*

[9] *Id.*, at 7.

[10] *Id.*

[11] Application, at 7.

[12] PAS Petition to Deny, at 1.

[13] *Id.*, at 2.

[14] PAS Petition, at 3.

[15] MCI letter, at 1

[16] *Id.*

[17] WUC Opposition, at 3.

[18] WUC Opposition at 4, citing International Competitive Carrier, 102 F.C.C. 2d 842, n.72.

[19] WUC Opposition, at 4.

[20] *Id.*, at 4-5.

[21] WorldCom Opposition, at 3.

[22] *Id.*

[23] *See* Western Union Corporation, *supra*, para. 20 at 6065, citing International Competitive Carrier Policies, *supra*, n.10 at 1283-1285.

[24] 15 U.S.C. §§ 17-18.

[25] Western Union Corporation, *supra*, at 6064-6065.

[26] Application, at 4, n.4.

[27] Application, at 4.

[28] *See:* WorldCom Opposition at 6-7, and WUC Opposition at 2-3. Compare PAS Petition at 2-3.

[29] In the *International Competitive Carrier* proceeding, the Commission determined a carrier that is more than 15% directly or indirectly owned by a foreign telecommunications entity or on whose board a foreign telecommunications entity sits shall be considered to be foreign-owned for the purposes of the Commission's international competitive carrier policy. *See* International Competitive Carrier, Report and Order, 102 FCC 2d 812 (1985), reaffirmed on reconsideration, 60 R.R. 2d (P&F) 1435 (1986). Subsequently, the Commission later clarified that foreign telecommunications entities include telecommunications and telecommunications-related equipment manufacturers, equipment suppliers, and service providers. *See* Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry, CC Docket 86-494, FCC 88-71 (released March 25, 1988).

[30] Submarine Cable Landing License Act of 1921, 47 U.S.C. § 34.

[31] Letter, from Parker W. Borg, Senior Deputy Coordinator, Bureau of International Communications and Information Policy, U.S. Department of State to Gerald Brock, Chief, Common Carrier Bureau, Federal Communications Commission, dated January 12, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 8, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR PROTOCOL PROCESSING SERVICES

On February 24, 1989, US West, Inc. (US West) filed a comparably efficient interconnection (CEI) plan to provide a variety of protocol processing services on an unseparated basis. According to US West, its Public Packet Switching Network and its various private line services are capable of providing data transport services to customers whose terminals and computers operate on a variety of protocols. However, to do so, US West states that it must perform net protocol conversions between various protocols. Under its proposal, US West would provide the necessary protocol conversions on an unseparated basis. US West states that it will add new protocols as new equipment becomes available.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before US West can begin implementing the proposed service.

According to US West, it will account for the joint and common costs of the protocol processing services pursuant to its Part 32 cost allocation manual that the Commission has approved (US West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195 (1988)). US West also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by **March 24, 1989,** and reply comments by **April 7, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of US West's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Status of Radio and Antenna
Equipment
Used in the Basic
Exchange Telecommunications Service

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1989; Released: February 27, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a letter dated July 27, 1988 (the Petition), Tallon, Cheeseman & Associates, Inc. (TCA) requests us to issue a declaratory ruling on whether the Basic Exchange Telecommunications Radio Service (BETRS) radio and antenna equipment located at or near a subscriber's premises (the subscriber unit) is regulated network equipment owned by a telephone company (local exchange carrier or LEC), with costs attributed to regulated accounts, rather than unregulated customer premises equipment (CPE). In a supplemental letter dated November 7, 1988 (the Supplemental Petition), TCA requests us to rule that the cost of installing the electrical outlet that provides power to the subscriber unit also should be treated as a cost of regulated telephone company equipment.[1] In light of our statutory goal of universal telephone service, which BETRS is designed to advance for rural areas, we find that the subscriber unit should be treated as regulated network equipment owned by the LEC.[2] We also conclude that the cost of installing the electrical outlet associated with the subscriber unit should be treated as regulated only when the outlet is on property that a LEC owns or leases, or for which a LEC has an easement or right-of-way, and that LECs are not required to install such outlets.

II. BACKGROUND

2. On January 19, 1988, the Commission released an order that introduced BETRS as a new service in the Rural Radio Service (RRS), [3] and specified the radio frequencies available for BETRS.[4] Among other things, the *BETRS Order* established BETRS to facilitate the availability of basic exchange telephone service to rural customers who cannot receive such service due to the high cost of constructing and maintaining wire or cable loops to these locations.[5] That order states that BETRS may be provided whenever it is more efficient to use radio rather than wire or cable loops for telephone service to remote areas, subject to spectrum availability. The *BETRS Order* requires BETRS providers to be state-certified LECs or to have permission from their state to provide basic exchange radio service, and to have a valid license from the Commission for BETRS radio frequencies. The *BETRS Order* also states the Commission's intention to treat wire and radio basic exchange service similarly with regard to eligibility for high cost assistance.[6]

III. THE SUBSCRIBER UNIT

A. *The Petition*

3. The Petition states that, for purposes of elgibility for high cost assistance, the Commission did not specify whether the subscriber unit is regulated equipment or unregulated CPE. TCA argues that this equipment should be classified as regulated network equipment for a number of reasons related to universal service goals. According to TCA, the subscriber unit is estimated to cost2200-2400, which TCA describes as "a considerable up front cost" for potential subscribers, particularly because the areas that lack telephone service are generally economically depressed. Indeed, TCA claims, the subscribers that would have to purchase these units as CPE are the same subscribers for whom the USF and the Link-Up America program are designed. TCA argues that the LECs are in a better position to purchase this equipment in bulk, and because of bulk purchases of parts, will be better able to maintain the subscriber units.[7] TCA states that if a LEC can include the subscriber unit in its cost evaluations, it can more realistically determine the true economic cost of BETRS in order to determine whether BETRS is more cost-efficient than telephone service through copper loops. Moreover, TCA notes, if a LEC owns a subscriber unit, it can reuse that unit if a subscriber were to move. Finally, TCA claims that competition for the purchase and repair of subscriber units is nonexistent in the rural areas where BETRS is cost-effective to install.

B. *Positions of the Parties*

1. *Functional Description of Subscriber Unit*

4. Commenters describe in some detail the configuration and functions of the subscriber unit,[8] but note that several versions of this unit are under development.[9] SWBT states that the subscriber unit includes an antenna and associated wiring; a power supply unit with batteries and an electrical outlet; and a remote terminal that contains digital control and radio circuitry and a telephone interface.[10] IMM states that its subscriber unit may be located up to 1 mile from the property of the BETRS customer, and that it is usually mounted on a telephone pole.[11] According to BellSouth, the subscriber unit is contained in a protective cabinet that is usually mounted on a pole separate from the subscriber's house, from which a drop wire runs to a protector placed on the subscriber's house.[12] BellSouth says that this protector connects to a standard network interface that separates the subscriber's inside wiring from network facilities; this network interface is the same standard interface used for wire-based subscriber loops and performs the same function.[13] According to BellSouth and others, inside wire and a standard telephone set are required for a subscriber to interconnect through the subscriber unit to the network. However, GTE indicates that in its BETRS field trials, the subscriber unit is designed to be located on the customer's premises "for environmental and power reasons."[14]

5. BellSouth, GTE, and TCA state that the subscriber unit is a necessary link for subscribers to receive and transmit the telephone communications that use Commission-authorized BETRS frequencies as the transmission medium.[15] According to IMM, when a subscriber places a call, the subscriber unit accepts the analog signal from the subscriber's telephone set and converts that signal to a digital radio signal. It then transmits the digital radio signal using a time division multiplexing scheme that enables four conversations to reach the network station at the LEC's serving office. Rockwell also states that one subscriber unit may serve several subscribers.[16] The subscriber unit also provides technical functions such as battery backup, ringing, supervisor coding, circuit diagnostics, and testing functions.[17]

2. ***Policy Issues***

6. A majority of parties argue that we should treat the subscriber unit as regulated network equipment to improve the provision of telephone service to rural and depressed areas and thereby expand universal service. Such parties emphasize that a ruling to the contrary would defeat the universal service goals that are the principal purpose of BETRS.[18] These commenters contend that LECs seeking to use BETRS to provide rural telephone service can only be eligible for low-cost Rural Electrification Administration (REA) financing and high cost assistance for the subscriber unit if we find it to be regulated network equipment and not CPE.[19]

7. According to these parties, treating the subscriber unit as regulated network equipment will directly benefit rural subscribers. Parties support the Petition's position that the subscriber unit is relatively expensive -- noting, for example, that the Ultraphone subscriber unit costs between2200 and2400 -- and arguing that subscribers in rural and economically depressed areas that cannot afford this outlay will not receive BETRS, or, most probably, any form of telephone service.[20] Parties argue that high cost assistance and REA financing are ways to eliminate this obstacle to rural service. Moreover, parties argue that in the case of a subscriber unit that serves multiple customers, classification of the unit as CPE owned by the subscribers could cause complications, since an individual subscriber could not remove a part of the unit when he or she moved.[21] In contrast, if the LEC owned such a unit, moves by subscribers would not cause such complications. Moreover, parties argue that LEC control of the subscriber unit is necessary to assure that there is no radio frequency interference since the subscriber unit is a highly complex part of the overall transmission system.[22] Ameritech argues that technical problems would result from moving the network interface to the network side of the subscriber unit,[23] since if the equipment is classified as CPE, it will need national standards for radio channel frequency and modulation techniques that have not yet been established. According to Ameritech, development of those standards will delay full and efficient implementation of BETRS.[24] Other parties also support many of the other contentions of the Petition.[25]

8. Despite the contentions of IDCMA and NATA, discussed below, that the subscriber unit is CPE under the Commission's existing precedents and regulations, these commenters also state that there are policy reasons that could justify a waiver of our rules so that the subscriber unit can be treated as regulated equipment. The primary reason for such a waiver, according to IDCMA, is the potential role of BETRS in increasing telephone service to users in remote and economically depressed areas. IDCMA notes the importance of the universal service goal, and states that classification of the subscriber unit as part of the network would presumably facilitate the ratepayer subsidies that may be necessary to realize such a goal. NATA states "This may be a case where rigid application of the Commission's Computer II rules would disserve the public interest."[26] IDCMA also notes that BETRS just happens to be the means by which the LEC is delivering telephone service to subscribers. Over time, according to IDCMA, many subscribers initially reached via BETRS will gradually be connected to the network via wireline facilities, and all equipment on the subscribers' premises, other than the protector, presumably will be CPE.[27]

3. ***Legal Issues***

9. While parties generally agree that our universal service policies argue for treating the subscriber unit as regulated equipment, they differ over whether the subscriber unit is CPE under our existing precedents and regulations. Ameritech and others argue that the subscriber unit is network equipment because it facilitates the provision of plain old telephone service (POTS) through a medium, digital radio, that is an alternative to the copper loop and is transparent to the customer.[28] BellSouth argues that the subscriber unit is network transmission equipment under our standard demarcation principles that apply to wire-based telephone service, since it is on the network side of the demarcation point.[29] BellSouth argues further that the subscriber unit is not apparatus accessible to the subscriber; indeed, it is separated from the customer-owned inside wiring and telephone set by a standard network protector. Pacific states that in the majority of cases, the subscriber unit will be located on a pole outside the customer's premises. Pacific further contends even if the subscriber unit is located on the customer's premises, it will be on the network side of the demarcation point of the standard network interface.[30]

10. GTE states that since the digital radio technology used in BETRS was not available during our general *Computer II* decisions on CPE,[31] we must make a determination on whether the subscriber unit is network transmission equipment or CPE as we did for digital termination systems in the *DTS Order*.[32] According to GTE, the subscriber unit uses the same digital transmission technology as DTS. Hughes states we have addressed similar issues in determining that Satellite Business Systems (SBS) earth stations and DTS subscriber stations are network transmission equipment rather than CPE[33] and are necessary elements of the transmission network.[34] Hughes states that the Ultraphone subscriber unit is technically and functionally similar to the DTS baseband unit that we found not to be CPE in the *DTS Order*.

11. Ameritech argues that the subscriber unit is similar to the subscriber loop carrier (SLC) equipment that the Commission found not to be CPE in the *LADT Order*,[35] since, it claims, the SLC equipment, like the subscriber unit, permits subscribers to receive telephone service without the need for additional loops.[36]

12. Some parties also attempt to distinguish the subscriber unit from network channel terminating equipment (NCTE), which is unregulated CPE. IMM states that NCTE provides a network interface, in contrast to the subscriber unit, which is an integral part of the BETRS

digital radio system.[37] Similarly, parties argue that the subscriber unit is different, for both technical and policy reasons, from the mobile radio and cellular system that we have found to be CPE.[38]

13. Although IDCMA and NATA support the universal service goals of BETRS, they argue generally that the subscriber unit is CPE, and contend that if we were to categorize broadly such equipment as regulated network equipment, such a finding would be inconsistent with and would jeopardize our procompetitive policies for CPE.[39] IDCMA argues that parties who support a finding that the subscriber unit is not CPE fail to distinguish numerous prior Commission orders that have found various forms of equipment located on customer premises to be CPE.[40] Further, IDCMA states that parties' arguments that support the classification of subscriber units as regulated equipment based on the ability of LECs to make bulk purchases, the high cost of the equipment, specialized installation requirements of the equipment, incompatability problems when subscribers move, have been made for other types of equipment that the Commission has classified as CPE. IDCMA notes that leasing and secondary markets are solutions to such problems. IDCMA also disputes IMM's analysis of the differences between NCTE and the subscriber unit.[41]

14. Despite its initial legal and policy arguments that the subscriber unit is CPE, IDCMA's reply states that if, as parties argue, the usual pattern is for the LEC to mount the subscriber unit on a pole separate from the subscriber's house, and if a drop wire, protector, and standard interface are used on the subscriber's side of the subscriber unit, then in this case the subscriber unit is network equipment.[42] Likewise, IDCMA states that if the equipment serves multiple subscribers, it would be network equipment.[43]

15. NATA states that the Petition presents a conflict between the *Computer II* rules, which, it claims, classify the subscriber unit as unregulated CPE, and our objectives of providing service to remote areas. NATA presents arguments that BETRS equipment like the subscriber unit is CPE, and contends that such units must be provided on a deregulated basis unless they qualify for a waiver of the Computer II rules.[44] According to NATA, the Petition does not provide sufficient information for us to waive our rules, and a further demonstration of need is required. NATA states that it does not oppose such a waiver if a detailed justification is submitted, and suggests application of the waiver standard that the Commission adopted for NCTE in the *Phase II Reconsideration* in *Computer III*.[45]

16. In reply, some parties argue that the waiver approach recommended by NATA and IDCMA would introduce uncertainty in the development of BETRS that would thwart universal service goals.[46] BellSouth argues that a waiver of CPE status for the subscriber unit is not appropriate since determining its status as regulated network equipment is consistent with our prior decisions. Furthermore, IMM argues that a finding that the subscriber unit is CPE would discourage the development of digital radio and thwart Congress's policy, expressed in the Communications Act of 1934 (the Act), of encouraging the provision of new telecommunications technologies to the public.[47]

C. Discussion

17. We treat the subscriber unit in BETRS systems provided by LECs as regulated network equipment. Our basis for this treatment is our goal of promoting universal telephone service in rural areas through deployment of BETRS systems. Our treatment of the subscriber unit as regulated network equipment will facilitate the specific universal service goals that BETRS is designed to address by increasing assistance available to rural subscribers through the USF and REA financing for obtaining BETRS service, and through whatever state subsidy systems are available for basic local exchange service. We note that if we did not treat the subscriber unit as regulated network equipment, the purpose of BETRS could well be undermined. The *BETRS Order* specifically stated the Commission's intent to treat BETRS similarly to wire basic exchange service for purposes of high cost assistance. Our decision in this order is consistent with the Commission's intent.[48]

18. Commenters in this proceeding generally agree that the universal service goals of BETRS warrant regulated treatment of the subscriber unit. Parties differ as to whether (i) policy reasons other than BETRS' universal service goals justify regulated treatment of this equipment; (ii) prior Commission decisions regarding the classification of equipment as CPE dictate the regulatory treatment of the subscriber unit; and (iii) we should issue a declaratory ruling on the status of the subscriber unit or treat it as CPE and waive the relevant rules establishing CPE's unregulated status. We address these issues in turn.

19. First, we see no need to address policy issues other than our universal service goals for BETRS in treating the subscriber unit as regulated equipment. Furtherance of those goals in this specific case fully justifies regulated treatment of the subscriber unit. Thus, we do not resolve whether many of the general arguments for regulated treatment of the subscriber unit, such as increased convenience for subscribers who move, elimination of complexity in installing and maintaining the equipment, and the ability of LECs to purchase subscriber units in bulk, would justify regulated treatment of the subscriber unit, or whether, as IDCMA and NATA argue, carriers could devise ways of fully realizing these advantages even if the subscriber unit is classified as CPE. The promotion of universal service, which will be fostered through the increased assistance available to LECs and their subscribers through the USF, REA financing, and similar programs, is the specific justification on which we rely for treating the subscriber unit as regulated.

20. Second, since our treatment of the subscriber unit as network equipment is based on the specific universal service rationale we have discussed, we see no reason to attempt to analogize the situation we address in this order to those that we have addressed in earlier proceedings for other forms of equipment on or near customer premises,[49] which did not raise the universal service issue as starkly and convincingly as does the BETRS subscriber unit. Commenters argue both ways on how we should classify the subscriber unit, citing precedents that, they claim, support their views as to whether the subscriber unit is unregulated CPE. In light of the specific universal service rationale that guides our decision, we do not need to resolve the question of which precedent most closely applies. Our decision in this order is narrowly tailored to meet our overriding policy concerns with respect to the provision of rural telephone service. Thus we do not rely

on the facts addressed in these prior decisions, but instead confine our action in this order to its unique circumstances.

21. Third, although parties differ over the procedural means by which we should address the regulatory status of the subscriber unit, we believe that the factual record in this proceeding helps to guide the procedural outcome. The comments and replies provide substantial information about subscriber units and the manner in which they are deployed.[50] Although it is clear that LECs can deploy these units in a number of ways, it appears, as IDCMA notes in its reply, that many, if not most, subscriber units will be deployed on LEC telephone poles in self-contained units outside of subscribers' premises and on the network side of the demarcation point. Such units apparently could be shared by several subscribers. In these cases, the subscriber unit would be network equipment regardless of our policy goals of increasing universal service to rural areas. However, the record also indicates that the subscriber unit could be placed in other locations, and that, in some cases, a subscriber unit could be deployed as CPE. To the extent that such situations occur, we waive our rules to permit LECs to treat such subscriber units as regulated network equipment.

22. We are aware that the configurations that LECs may use to deploy this equipment may change as BETRS develops and evolves. We are willing to reexamine our regulatory treatment of the subscriber unit, if necessary, after such evolution progresses more fully.[51]

IV. ELECTRICAL OUTLET

A. *The Supplemental Petition*

23. The Supplemental Petition requests that the cost of installing the electrical outlet used for the BETRS equipment be included in the LECs' regulated books of account. TCA argues that the cost of installing the outlet, which it estimates as150, is an integral part of installing the subscriber unit. Moreover, TCA states that: (1) the customer will not have any other use for the external electrical outlet; (2) REA funding will not be available for the electrical outlet installation if it is not capitalized on the LECs' regulated books; and (3) the proper installation of the electrical outlet is beneficial to the LEC and the subscriber.

B. *Positions of the Parties*

24. TCA and others argue that we should allow LECs to determine in a flexible way whether to install the electrical outlet that powers the subscriber unit.[52] TCA argues that each company must be free to discern for itself the presence and effect of such factors as available power sources, prevailing electrical codes and union labor to determine the feasibility of undertaking the electrical connection. Accordingly, several parties argue, LECs should be allowed to include the costs of installing the electrical outlet as regulated costs when appropriate. Some parties advocate a flat ruling that such costs should be allocated to regulated accounts.[53]

25. However, Pacific argues that we should not require LECs to provide the electrical outlet as regulated telephone equipment, because of potential problems that LECs could have in dealing with electrical codes, practices of local electricians, and the rules and tariffs of local power utilty companies.[54] Moreover, Pacific states that many houses that could receive BETRS have substandard electrical wiring; it expresses concern that under the relief requested in the Supplemental Petition, the improvements needed in such electrical wiring for installation of a BETRS electrical outlet would be charged to ratepayers. GTE states that it has determined through field tests on BETRS equipment located on the customers premises that alternating current (AC) power provision by the customer is the appropriate method for the subscriber units used in its field trials.[55] GTE found that when it paid directly for the AC power the cost was generally more than the revenue it charged for the basic telephone service. However, GTE proposes that we should either not address this issue or permit LECs to determine the treatment that should be accorded installation of the AC electrical outlet for BETRS.[56]

C. *Discussion*

26. Two issues are raised in this proceeding concerning the electrical outlet that powers the subscriber unit: whether a LEC can include the installation costs for such an outlet in its regulated accounts, and whether a LEC must install such an outlet for the subscriber unit. Because, as we have discussed above, the placement of the subscriber unit may vary, it is clear that the location of the electrical outlet that powers this equipment may vary as well. We conclude that when the electrical outlet is installed on property owned or leased by the LEC or for which the LEC possesses an easement or right-of-way, the LEC can include the installation costs of the outlet in regulated accounts.[57] However, when this is not the case, and an electrical outlet is on the customer's premises, it should be treated as the customer's property and its installation costs, if any, should not be included in regulated accounts. Given these potential variations in the location of the electrical outlet, we see no need to specify whether LECs must install the electrical outlet for the subscriber unit, and do not require them to do so.

V. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201 and 202 of the Communications Act of 1934, as amended, 47 USC §§154(i), 154(j), 201, and 202, and Sections 1.1 and 1.2 at our Rules and Regulations, 47 CFR §§1.1 and 1.2, that the Petition and the Supplemental Petition described in Paragraph 1 above are GRANTED to the extent discussed herein and are OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief
Common Carrier Bureau

APPENDIX A

The following parties filed comments on the Petition and Supplemental Petition:

Ameritech Operating Companies (Ameritech)
Boeing Electronics (Boeing)
Codecom Rural Communications, Inc. (Codecom)
Dubois Telephone Exchange (Dubois)
GTE Service Corporation (GTE)
GVNW Inc./Management (GVNW)
Hughes Network System, Inc. (Hughes)
Independent Data Communications Manufacturers Association (IDCMA)
International Mobile Machines Corporation (IMM)
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)
National Telephone Cooperative Association (NTCA)
North American Telecommunications Association (NATA)
The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pacific)
Rockwell International Corporation (Rockwell)
Rural Electrification Administration.
U.S. Department of Agriculture (REA), Comments withdrawn by letter dated January 12, 1989.
S&A Telephone Company, Inc. (S&A)
Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (BellSouth)
Southwestern Bell Telephone Company (SWBT)
Telular Inc. (Telular)
Telemobile Inc. (Telemobile)
United States Telephone Association (USTA)

The following parties filed reply comments:

ALLTEL Corporation (ALLTEL)
Ameritech Operating Companies (Ameritech)
GTE Service Corporation (GTE)
Independent Data Communications Manufacturers Association (IDCMA)
International Mobile Machines Corporation (IMM)
National Telephone Cooperative Association (NTCA)
Southern Bell Telephone Company and South Central Bell Telephone Company (BellSouth)
Southwestern Bell Telephone Company (SWBT)
Tallon, Cheeseman & Associates (TCA)

FOOTNOTES

[1] Letters from Larry Van Ruler, TCA, to Chief, Common Carrier Bureau, FCC, dated July 27, 1988 and November 7, 1988. We treat these letters as a petition and supplemental petition for declaratory ruling, respectively. We invited public comment on the Petition and Supplemental Petition in a public notice released on December 2, 1988. Commenters are listed in Appendix A. We use the abbreviations in that appendix throughout this order.

[2] Two commenters in this proceeding, Codecom and Telular, state that we should make a similar finding with respect to fixed cellular equipment on the subscriber premises used in BETRS. Codecom also states that fixed cellular pay telephones should be found to be network equipment when used in BETRS service. The Petition and Supplemental Petition do not raise these issues, and we conclude that these issues are beyond the scope of this proceeding, which is limited to subscriber units provided by LECs.

[3] In the Matter of Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214 (1988) (*BETRS Order*).

[4] In addition to concluding that BETRS should be included in RRS, the *BETRS Order* found that RRS should be available on a co-primary basis with Public Land Mobile Service licensees, and that fifty channels from the Private Radio Service allocation should be available on a co-primary basis for BETRS. *BETRS Order*, 3 FCC Rcd at 215, para. 14. The Commission later held that the use of cellular frequencies for BETRS is also appropriate. *See* Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, 3 FCC Rcd 7033 (1988) at 7041, para. 66.

[5] *Id.* at para. 42.

[6] *Id.* at 217 n. 10. The Commission established the Universal Service Fund (USF) to "promote or preserve universal service by enabling high cost [LECs] to establish local exchange rates that do not substantially exceed rates charged by other companies." MTS and WATS Market Structure, 93 FCC 2d 241 (1983). The high cost assistance program associated with the USF permits those LECs in study areas where loop costs are higher than the national average to allocate costs to the interstate jurisdiction that are over and above the basic interstate allocation, thereby reducing the intrastate cost allocation and permitting lower local service rates in these study areas. *See* MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953, 2956 (1987).

[7] According to TCA, if the subscriber unit is classified as regulated equipment, the LEC will better be able to manage the use of BETRS in conjunction with the installation of copper cable when such installation becomes cost-effective.

[8] For example, IMM describes its Ultraphone, a digital, time division multiplexed radio loop system that the Commission discussed in the *BETRS Order*. *Id.* at 10 n. 7. IMM states that over a dozen LECs are using Ultraphone. IMM Comments at 1.

[9] GTE says that there are at least three manufacturers of such equipment. GTE Comments at 5.

[10] SWBT Comments at 3.

[11] IMM Comments at 3. *See also* SWBT Comments at 3.

[12] BellSouth Comments at 2.

[13] *Id.* at 3.

[14] GTE Comments at 8-9. GTE does not further describe its system's configuration.

[15] BellSouth Comments at 2; TCA Reply at 3; GTE Comments at 5; IMM Comments at 6.

[16] Rockwell Comments at 1.

[17] SWBT Comments at 3.

[18] Ameritech Comments at 2-3; Dubois Comments at 1.

[19] GTE Comments at ii, 6; GVNW Comments at 1; NTCA Comments at 4.

[20] Petition at 1; OPASTCO Comments at 5; Ameritech Comments at 2; Dubois Comments at 1; Boeing Comments at 1; GTE Comments at 2.

[21] SWBT Reply at 4; Rockwell Comments at 1; Boeing Comments at 1; IDCMA Reply at 6 n. 12.

[22] GTE Comments at ii.

[23] Ameritech Comments at 3.

[24] *Id.* at 4.

[25] For example, parties argue that, if subscriber units are treated as network equipment, LECs can purchase them in bulk, thereby lowering unit costs. GTE Comments at 2; Rockwell Comments at 1. OPASTCO states that the subscriber unit should be regulated equipment because it is complex and requires precise installation and maintenance by the LEC. OPASTCO Comments at 3; *see also* GTE Comments at 3. OPASTCO notes that each BETRS system will have unique characteristics that depend on the nearby terrain, the radio frequencies used, and the location of the LEC. OPASTCO Comments at 3-4. GTE argues that treating the subscriber unit as regulated would give LECs the flexibility to decide when to change their network designs and to decide when wire loop may be more cost-effective. GTE Comments at 2.

Parties also indicate that because each manufacturer's BETRS system is different, and design parameters such as modulation techniques and signaling methods have not been standardized, if a subscriber moves, the subscriber unit is not necessarily reusable in another system and thus would become valueless to a subscriber who owns it as CPE. *Id.* ; Rockwell Comments at 1; NTCA Comments at 3; USTA Comments at 1. Moreover, parties state that if a LEC changes its network, treatment of subscriber units as CPE could cause subscribers to bear the costs of those units that become obsolete. *Cf.* NTCA Comments at 3.

[26] NATA Comments at 2. NATA argues that a temporary waiver of the CPE rules for subscriber units would enable us to determine whether special treatment was needed for this equipment after the technology and demand for BETRS are more fully developed.

[27] IDCMA Comments at 7-9. *See also* IDCMA Reply at 7 (Waiver would permit realization of the universal service goals of BETRS).

[28] *See* Ameritech Comments at 2; GTE Comments at 11; Boeing Comments at 1. *See also* NTCA Comments at 3; OPASTCO Comments at 3 (Subscriber unit is replacement for copper loop); GTE Comments at 5; IMM Comments at 11 (Subscriber unit is component of transmission system).

[29] BellSouth Comments at 2; SWBT Comments at 4; TCA Reply at 2; NTCA Comments at 2.

[30] Pacific Comments at 1. *See also* US West Comments at 2-3; BellSouth Reply at 3.

[31] GTE Comments at 4. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980), *modified*, 84 FCC 2d 50 (1980), *further modified*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *further modified*, FCC 84-190 (released May 4, 1984).

[32] GTE Comments at 4, *citing* Petition for Declaratory Ruling Regarding the Status of Certain Equipment Necessary to Provide Digital Termination Systems or, in the Alternative, Petition for Waiver of Section 64.702 of the Commission's Rules to Enable Pacific Bell to Offer Integrated Digital Termination Systems (DTS), Memordandum Opinion and Order, ENF File No. 84-58, Mimeo No. 6577 (released Aug. 22, 1985). *See also* IMM Comments at 7; IMM Reply at 4; *DTS Order* at para. 15.

[33] Hughes Comments at 3; *See also* IMM Comments at 9. IMM states that our *Computer II* decisions determined that devices such as transmit earth stations are network equipment, despite their location on customer premises, because they perform network control functions. *See also* IMM Reply at 4.

[34] Hughes Comments at 2; GTE Reply at 5.

[35] International Business Machines Corporation Petition for Declaratory Ruling, ENF File No. 83-34, Memorandum Opinion and Order, FCC 85-292 (released June 11, 1985).

[36] Ameritech Reply at 2-3. Ameritech argues that when a subscriber unit serves multiple customers, it falls within the "multiplexer exception."

[37] IMM Comments at 7.

[38] *See, e.g.*, NTCA Reply at 3; OPASTCO Comments at 5; SWBT Reply at 4 n. 4.

[39] *See, e.g.*, IDCMA Comments at 2; NATA Comments at 3-6. As noted above, for this reason both parties support some form of narrow waiver of our rules regarding CPE in order to treat the subscriber unit as network equipment.

[40] IDCMA Comments at 4-5, *citing Computer II; LADT Order*, Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, 94 FCC 2d 5 (1983) (*NCTE Interconnection Order);* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Computer III), 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988), *further reconsideration pending, appeals pending sub nom* California v. FCC, No. 87-7230 (9th Cir) (pet. for rev. filed May 28, 1987) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also* Report and Order, 2 FCC Rcd 3072 (1987) *modified on reconsideration*, 3 RCC Rcd 1150 (1988), *further reconsideration pending, appeals pending sub nom* BellSouth Corp. v. FCC, No. 87-7290 (9th Cir.) (pet. for rev. filed Apr. 20, 1988), California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988), and Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988) *(Computer III);* Integrated Services Digital Networks (ISDN) 98 FCC 2d 249 (1984) *(ISDN Order);* An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems *(Cellular)*, 86 FCC 2d (1981) *(Cellular Order)* (subsequent history omitted).

[41] IDCMA Reply at 4.

[42] *Id.* at 5-6.

[43] *Id.*

[44] *Id.* at 3-4.

[45] *See* 3 FCC Rcd at 1167, n. 247.

[46] IMM Reply at 5.

[47] IMM Comments at 10, *citing* Section 303(g) of the Act, 47 USC § 303(g).

[48] We note that in creating Category 8.13 of the USF, for Subscriber Line Circuit Equipment, the Commission specifically cited comments from REA stating that Category 8.13 includes plant used in providing radio telephone service. According to

REA, Category 8.13 is important because radio telephone service is often a cost-effective means of serving subscribers in remote location. REA stated that not including Category 8.13 in the USF would discourage the use of this technology. Amendment of Part 69 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781, 797 (1984).

[49] *See, e.g., Computer II; Computer III; DTS Order; LADT Order; ISDN Order; Cellular Order;* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 84 FCC 2d 50 (1980) *(Transmit Earth Stations Order);* Amendment of Part 68, 97 FCC 2d 527 (1984),*mod. on recon,* FCC 85- 347 (released July 12, 1985) *(Demarcation Point Order);* Deregulation of Mobile Customer Premises Equipment, 54 RR 2d 1147 (1983) *(Mobile CPE Order).*

[50] The record thus adequately addresses the concerns of IDCMA and NATA that the Petition provides inadequate information about the equipment at issue.

[51] We see no need to grant a temporary waiver, as NATA suggests. Moreover, given our analysis of the issues raised in the Petition, we do not address issues raised by NATA's suggestion that the NCTE waiver standard of *Computer III* should apply.

[52] TCA Reply at 5; SWBT Reply at 6; ALLTEL Reply at 2; NTCA Reply at 3; Ameritech Reply at 4.

[53] Bell South Comments at 3; Dubois Comments at 1; Boeing Comments at 1.

[54] Pacific Comments at 2. *See also* US West Comments at 4.

[55] GTE Comments at 8.

[56] GTE Reply at 3.

[57] Thus, when a LEC installs an electrical outlet on its property to power a subscriber unit that is located on a telephone pole or that serves multiple subscribes from a central location, it may allocate the installation costs to regulated accounts.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. No. 16 — Transmittal No. 1445

ORDER

Adopted: February 24, 1989; Released: February 28, 1989

By the Chief, Common Carrier Bureau:

1. On December 16, 1988, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1445, introducing Tariff 16, "Competitively-Bid Governmental Services" – a tariff limited to services provided to the Government as a result of a competitive bidding process. Transmittal 1445 also establishes rates and regulations for AT&T's initial Tariff 16 offering, "Oahu Telephone System Outbound Calling Service (OTCS)," a service developed in response to a Department of Defense (DoD) solicitation for provision of domestic and international long distance service from the Oahu Telephone System for DoD. AT&T Description and Justification (D&J) at 3.

2. On January 3, 1989, petitions to reject or suspend Transmittal 1445 were filed by Telefonica Larga Distancia (TLD), GTE Hawaiian Telephone Company (Hawtel), and MCI Telecommunications Corporation (MCI). On that same date, the Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a letter expressing concern about the filing.[1] AT&T filed a reply to the petitions on January 17, 1989. The tariff is scheduled to become effective March 1, 1989.

3. OTCS, designed for DoD installations in Hawaii, is an end-to-end usage sensitive outbound calling service that will use AT&T's switched network to transmit DoD voice, data, and graphic communications from DoD locations in Hawaii to the Mainland, Alaska, Puerto Rico, the U.S. Virgin Islands, and international locations. *Id.* at 6-7. OTCS is time-of-day sensitive and postalized within DoD-specified terminating domestic and international regions. *Id.* at 7. OTCS is provided with a minimum service period of three years, during which AT&T has agreed not to initiate any rate increases. Calls are rated using a minimum initial rating period of 18 seconds and additional usage increments of six seconds. *Id.* at 8.

4. MCI argues that AT&T's proposed tariff is unlawfully restricted to offerings provided to the Government pursuant to a competitive bidding process. MCI Petition at 4-5. MCI further contends that, while "Government" may be a class to which different charges may apply, the Act does not provide that only *some* Government services provided under narrow circumstances to certain Government agencies can represent a class. According to MCI, AT&T, through Tariff 16, is shielding rates for a particular Government agency that are unreasonably discriminatory, in that OTCS is nothing more than WATS or some other conventional switched offering priced at a special discount. *Id.* at 6-7. MCI then argues that assuming, arguendo, that Tariff 16 is lawful and that OTCS is not like other AT&T switched services, the Commission should still reject the OTCS proposal because AT&T has failed to demonstrate that the rates for the service are just and reasonable. According to MCI, AT&T has provided no information about its calculation of rates, taking into account the unique postalized feature of the rate structure. *Id.* at 10. Finally, MCI contends that AT&T's proposal violates the Commission's prohibition on resale and sharing. *Id.* at 9-10.

5. Hawtel focuses on alleged deficiencies in the data supporting the OTCS offering, in particular AT&T's alleged failure to account for outpayment costs, a major expense in providing international MTS service (IMTS). Hawtel estimates that over 75 percent of AT&T's variable costs for IMTS service should be attributed to outpayments. Hawtel Petition at 2. Hawtel also maintains that AT&T has not identified the costs of backhauling its IMTS traffic to the continental United States, and that AT&T's profitability analysis is insufficiently disaggregated to determine whether AT&T's interstate toll rates are subsidizing its IMTS rates. *Id.* at 4.

6. TLD charges that Transmittal 1445 allows AT&T to price its services predatorily and to discriminate against the vast majority of its customers. TLD Petition at 3. Because AT&T exercises nearly complete market control in Puerto Rico, TLD argues, it has no need to offer customer-specific tariffs to compete effectively. *Id.* at 4. Finally, IDCMA objects to the preference given to Tariff 16 services in the event of a shortage of service components. IDCMA Letter at 2.[2]

7. AT&T replies that the Communications Act permits carriers to establish for Government users a separate class of service to which different charges may apply, and disputes MCI's contention that such a class must consist of all Government services. AT&T also dismisses petitioners' assertions that its tariff support material is insufficiently detailed and disaggregated. *Id.* at 5-6. AT&T observes that it has provided estimates for both the Switched Services category and AT&T's total interstate enterprise, and that it has provided a net revenue analysis indicating that OTCS would produce positive net revenues for the first three study years. *Id.* at 6. In regard to MCI's speculation that OTCS might become noncompensatory, AT&T replies that the models it used to project costs are conservative and that its costs are projected to decline, not rise, as it introduces new, more efficient technology in its network, and as local exchange carriers reflect the economic efficiencies of upgraded facilities in their access rates. *Id.* at 8. Finally, AT&T disputes Hawtel's assertion that AT&T has failed to account for outpayment and backhauling costs. *Id.* at 8-10.

8. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

9. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate AT&T Transmittal No. 1445, filed by MCI Telecommunications Corporation, Telefonica Larga Distancia, and GTE Hawaiian Telephone Company ARE DENIED.

10. IT IS FURTHER ORDERED that the petition for waiver filed by the Department of Defense to permit it to file comments on the above-referenced petitions IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] On January 13, 1989, DoD filed comments on these petitions, together with a petition for waiver to permit such a filing. As DoD's comments are not allowed by the Commission's Rules, its petition for waiver is denied and its comments not considered in this Order. *See* Section 1.773(b)(1), of the Commission's Rules, 47 C.F.R. § 1.773(b)(1).

[2] On February 23, 1989, AT&T filed Application No. 514 to allow it to remove this provision from its proposed tariff. On February 24, 1989, the Chief, Tariff Division, granted Special Permission No. 89-185 to allow AT&T to make this revision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DELRAY CELLULAR ASSOCIATES — File No. 01509-CL-AL-1-88
163500-89-08-LD

For Consent to Assign the License of Domestic Public Cellular Radio Telecommunications Service Station KNKA454 in Beaumont-Port Arthur, Texas to Bauce Communications, Inc.

NOTICE OF APPARENT LIABIITY AND ASSIGNMENT OF LICENSE

Adopted: March 2, 1989; Released: March 9, 1989

By the Acting Chief, Mobile Services Division:

INTRODUCTION

1. The Bureau hereby serves notice on Delray Cellular Associates (Delray), that it appears it has not provided service to the public on Station KNKA454 consistent with the requirements of Section 22.43 of the Commission's Rules and Regulations (the Rules), 47 C.F.R. Section 22.43. In view of this apparent violation, we further serve notice on Delray that it is apparently liable for a forfeiture as provided for in Section 503(b) of the Communications Act of 1934, (the Act). 47 U.S.C. Section 503(b). We issue this Notice of Apparent Liability, based on the facts set forth below, in accordance with Section 503(b) of the Act and Section 1.80 of the Rules. 47 C.F.R. Section 1.80. Further, upon payment of the aforementioned forfeiture, Delray's assignment of license for KNKA454 to Bauce Communications Inc. (Bauce) is authorized.

BACKGROUND

2. On October 8, 1986, Delray obtained a construction authorization for the Beaumont, Texas nonwireline license. On February 24, 1988, Delray filed FCC Form 489, for completion of construction and notification of operation of its Beaumont system. On June 23, 1988, GTE Mobilnet Incorporated (GTE), the wireline licensee in the Beaumont-Port Arthur Metropolitan Statistical Area (MSA), notified the Commission that Delray might be in violation of Section 22.43 (c)(2) of the Rules and requested an investigation. According to GTE's conversation with Delray's engineer, Richard L. Vega, GTE was advised that as late as June 16, 1988, Delray's system was (1) not on the air, (2) was not expected to be operational until at least July 15, 1988 and (3) that Delray was using voice channels for testing purposes, but it was not using the authorized signal channels to provide service to the public. On June 29, 1988, the Mobile Services Division (MSD) requested information from Delray regarding GTE's allegations. On July 7, 1988, Delray responded to the MSD's request for information. On August 17, 1988, GTE supplemented its earlier request for investigation with evidence corroborating its allegation that Delray was not operational within 18 months of its authorization.

3. In its informal request for investigation, GTE alleges that Delray's system did not provide service to a single customer and was not operational within the time required by Section 22.43 of the Rules. It further states that, Delray, by its own admission, served its first ten customers during the second week of July 1988, more than three months beyond the 18 month deadline. GTE requests clarification of the language of the rule, particularly as to whether "operational" is defined as "available but not in service," rather than actually offering service to the public; and, whether "re-selling" constitutes service to the public within the framework of Section 22.43 of the Rules.

4. On June 27, 1988, Delray filed the above-captioned Application for Assignment.[1] On August 9, 1988, Mid-America filed a Petition to Deny and opposition pleadings were filed by Delray. Mid-America filed a Reply. In its Petition to Deny, Mid-America reiterates the allegations it made in its Application for Review of *Memorandum Opinion and Order*, 3 FCC Rcd 5162 (Com. Car. Bur. 1988) (*Order on Review*) [2] and asserts that "it would be improper and *prima facie* inconsistent with the public interest" for the Commission to grant the assignment. In its Petition, Mid-America again challenges Delray's financial and technical qualifications to hold this license. In its Opposition, Delray argues that Mid-America articulates no basis for the denial of Delray's proposed assignment and that its Petition is merely another "transparent attempt to impose further delay and expense on Delray." With respect to Mid-America's Petition to Deny, we find that we have already denied its Petition on the merits in the *Order on Review*. Moreover, Mid-America raises no new issues in its Petition that have not already been decided against it. What is more, Mid-America does not raise any allegations that it would not be in the public interest for the transferee to hold this license.

DISCUSSION

5. After a thorough evaluation of the facts, we find that Delray did not comply with Section 22.43 of the Rules.[3] For that reason we issue this Notice of Apparent Liability. However, we will approve the assignment of the license, conditioned on payment of the forfeiture, since no evidence has been submitted to support an allegation of deliberate violation of the rule or of deliberate misrepresentations to the Commission.

6. Section 22.43 was adopted to ensure that "cellular permittees selected by lottery proceed expeditiously to construct authorized systems" and it serves to "screen out speculative, insincere applicants." *Report and Order*, 51 Fed.Reg. 28236 (1986). The 18 month rule was established because it was determined "that a 12 month *initial service requirement* would be insufficient to complete the ordering and installation of complex equipment as well as receiving necessary local authorization." *Report and Order*, *supra* at para 3. (emphasis added). In accord with the rule, "construction of an initial phase" must be "completed and provision of service begun within 18 months." *Id.* The Commission has adopted a wireline set-aside for each MSA, licensing a wireline and a non-wireline. *See* Section

22.902(b) Each of these two classes of carrier must construct an initial phase of their system within 18 months and commence providing service to the public in order to comply with Section 22.43 of the Rules. Resale of the competing carrier's service, therefore, does not constitute service to the public within the framework of Section 23.43.

7. It is undisputed that Delray did not put its first customers on its own system until July 10, 1988. Delray maintains that by re-selling from the GTE system, it complied with the service requirement of Section 22.43. Delray argues that it was ready to operate its system, albeit on a control channel and not on its authorized channels, on April 7, 1988, but that due to the unanticipated success of a one-time-only marketing promotion held in February 1988, which resulted in increasing its subscribers from approximately 140 to 330, switching to its own system at that time would have caused service to its customers to suffer dramatically. Delray alleges that the marketing strategy, which involved issuing a free cellular phone to each of its new subscribers who signed up for service on the day of the promotion, was not contemplated to be so successful as to tax its facilities and require a second cell to be constructed. However, Delray admits that it did not order any of its equipment until approximately 16 months after it received its authorization and made the business judgement to proceed with the marketing promotion fully aware that it would have only two months remaining to construct and provide service on its system. Delray did not file for an extension of time to comply with the 18 month requirement and, on April 8, 1988, was not in a position to comply with Section 22.43 of the Rules. Delray made the decision to delay putting its customers on its own system until three months after the 18 month deadline, relying on its misunderstanding that re-selling would constitute the provision of service under Section 22.43.

8. In view of the foregoing, it appears that Delray did not provide service on its system within the 18 month period required by Section 22.43 (c)(2) and (c)(4). In fashioning appropriate penalties, we are required to consider "the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 C.F.R. Section 503(b)(2). We note that Delray waited 16 months to order its equipment and it constructed its system by April 7, 1988, but was not operating on an authorized signal channel by April 8, 1988, as required by the Rules. The sanctions available to the Commission range from a written warning, to a forfeiture not to exceed20,000, to a revocation of license pursuant to Section 312 of the Act. In the circumstances of this case, including the fact that Delray did construct its system by April 7, 1988, that it was offering some service to its subscribers, albeit in a re-selling mode, and that it provided service on its own system within ninety days after the prescribed deadline, we conclude that a9,950 forfeiture is appropriate and that no more severe sanction is warranted. *See generally T-Com, Inc.*, 3 FCC Rcd 1772 (Com. Car. Bur. 1988), *application for review pending*.

9. Finally, with respect to Mid-America's Petition to Deny, we find that we have already denied these allegations on the merits in *Memorandum Opinion and Order*, 3 FCC Rcd 5162 (1988). Moreover, Mid-America raises no new issues nor does it raise any allegations against the transferee. *See* Section 310(d) of the Act.

10. Moreover, we find Bauce Communications, Inc. qualified to hold the license involved in this assignment. We also find that approving the assignment will serve the public interest, convenience, and necessity. Accordingly, we grant the assignment of the license, subject to the condition precedent that a9,950 forfeiture is deposited with the Commission prior to consummation of the transaction.

ORDERING CLAUSES

11. IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.80, that Delray Cellular Associates, is apparently liable for forfeiture in the amount of 9,950 for violation of Section 22.43 of the rules. 47 C.F.R. Section 22.43.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. Section 1.80(f)(3), that Delray may within thirty days of the date of this notice pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, or may file a response showing why a forfeiture should not be imposed or should be reduced.

13. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested to Delray Cellular Associates, dba Cellular One - Beaumont, 4414 Dowlen Road, Suite 105, Beaumont, TX 77707.

14. IT IS FURTHER ORDERED, pursuant to Section 22.39, that upon payment of of the aforementioned forfeiture, Delray Cellular Associates, is authorized to assign to Bauce Communications, Inc. the license for station KNKA454 for the Beaumont-Port Arthur, Texas Metropolitan Statistical Area.

15. IT IS FURTHER ORDERED that the Petition to Deny filed by Mid-American Cellular Systems, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Acting Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Public Notice of the filing was dated July 18, 1988 (Report No. CL-88-135).

[2] The Bureau found that Delray had satisfied the "reasonable assurance" standard with respect to its financial showings and rejected Mid-America's other contentions.

[3] Section 22.43 (c)(2) and (4) provide:

(2) For systems beyond the top-90 markets, construction of an initial phase of the system, which may consist of one or more cells, must be completed, and a notification on Form 489 that

the system is ready to commence service to the public must be filed, within 18 months from the date the radio station authorization is granted.

* * *

(4) Failure to begin service in a timely manner in accordance with this rule will result in the termination of the authorization; unless a station is constructed and the failure to commence service is for reasons of inability to obtain state certification in the state that permits construction before certification is obtained. The licensee is required to show proof of state law requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL
TELEPHONE COMPANY

Plan for Comparably Efficient
Interconnection of Enhanced
Services Providers for
Protocol Conversion Services

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1989; Released: March 9, 1989

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 31, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] Southwestern Bell Telephone Company (SWBT) filed a Comparably Efficient Interconnection (CEI) plan (the Plan) for protocol conversion services that will facilitate data communications among customers whose terminals and host computers operate on a variety of protocols.[2] No comments were filed on the Plan, and only SWBT filed a reply. *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service, or class of enhanced services, on an unseparated basis prior to implementation of a comprehensive Open Network Architecture Plan (ONA) to submit and obtain approval of a CEI plan for the specific services it proposes to offer. In this Order, we approve the Plan, subject to certain conditions.

II. THE PLAN

A. *Service Description*

2. SWBT proposes to provide protocol conversions between different synchronous protocols by offering X.PC, 3270 Bisynchronous (DSP), and 3270 SNA (DSP) protocols for use with its Public Packet Switching Network (PPSN). According to SWBT, the protocol conversion services will provide customers with an efficient, economical and competitive solution to their data transport needs. Under the Plan, SWBT initially expects to offer the following synchronous protocols: IBM 2780, IBM 3780, Burroughs BDLC (Burroughs Data Link Control); and Sperry UDLC (Universal Data Link Control). The Plan also proposes to offer additional synchronous protocols as new equipment becomes available and is deployed or as manufacturers release specifications for additional synchronous protocols.

3. SWBT proposes to use a packet/assembler/disassembler (PAD) or a TYMNET "engine," which apparently performs similar functions, to perform the actual protocol conversions. The PAD or "engine" would be located in SWBT's central office. SWBT will provide the connections between its PADs or "engines" and the PPSN through dedicated and dial-up facilities.

4. The Plan does not apply to asynchronous/X.25 and asynchronous/X.75 conversions, to the extent that SWBT is already permitted to offer those services pursuant to a Commission waiver. However, SWBT will provide protocol conversions between and among any such protocols, *e.g.*, between X.25 and X.PC.

B. *Proposed CEI Arrangements*

5. SWBT plans to offer protocol conversion services on an unseparated basis. SWBT states that all the basic services that will be used in providing protocol conversion services, which include local exchange access, analog private line, and digital private line, will be available in existing tariffs. SWBT proposes to charge itself the same tariffed rates as those charged other enhanced service providers (ESPs) for the basic services used in association with the enhanced protocol conversions described in the Plan.

C. *Other Nonstructural Safeguards*

6. SWBT states that its procedures for implementing the customer proprietary network information (CPNI) and nondiscrimination reporting requirements are described in its ONA plan, and it attaches that portion of its ONA plan at Exhibits A & C.

III. DISCUSSION

7. We conditionally approve SWBT's Plan. We conclude that SWBT has complied with the CEI parameters described in the *Phase I Order*.[3] SWBT satisfies the CEI pricing requirements since all the basic services that SWBT will use to offer protocol processing will be available to all ESPs and end users through generally applicable tariffs.[4] Both SWBT's enhanced service operations and its competitors will have access to the same basic services at the same rates and on the same terms and conditions.

8. We also approve the CPNI part of SWBT's plan, subject to the following condition. The *BOC ONA Order* [5] discusses in detail a number of CPNI issues, and requires all the BOCs to amend their ONA plans to conform to these requirements. When SWBT's ONA amendments for CPNI become effective, SWBT must implement those amendments for its protocol conversion services as well as its other enhanced services. In the interim period until such amendments for CPNI are approved and implemented, SWBT may follow the CPNI procedures proposed in its CEI plan. As in the *SWBT VMS Order*,[6] we prohibit SWBT from using CPNI to identify particular customers of existing protocol conversion competitors for "targeted" marketing efforts.

9. The *BOC ONA Order* also addresses nondiscrimination reporting issues and requires several revisions to the reporting formats that SWBT and the other BOCs propose.[7] Once SWBT amends its reporting formats and the amendments become effective, SWBT should incorporate these amendments into this CEI plan. As an interim measure, SWBT may submit reports in the format proposed in the Plan. Finally, we note that SWBT remains subject to the Commission's network information

disclosure requirement, although the current Plan does not propose any changes to existing network interfaces. We approve this part of the Plan subject to the condition that SWBT comply with this requirement if any new network interfaces are necessary in the future.

IV. ORDERING CLAUSES

10. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, and 218, and 5 U.S.C. §553, SWBT's CEI Plan for Protocol Conversion Services IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration pending*, (pet. for rev. filed Apr. 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] Plan at 2.

[3] *Phase I Order*, 104 FCC 2d at 1039-1043.

[4] Plan at 13.

[5] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, *Phase I, Memorandum Opinion and Order*, 4 FCC Rcd 1, (1989).

[6] *See* SWBT Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 6912 (1988), at para. 37.

[7] *BOC ONA Order* at paras. 467-431, 481-488.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

WISCONSIN BELL, INC. File No. W-P-D-347

To discontinue service on its broadband distribution system in Brookfield, Wisconsin.

ORDER AND AUTHORIZATION

Adopted: March 2, 1989; Released: March 9, 1989

By the Chief, Common Carrier Bureau:

1. Wisconsin Bell, Inc. (Applicant or Bell) has filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, seeking Commission authorization to discontinue channel service offered over its broadband distribution system in the City of Brookfield, Wisconsin (City). Applicant states that approval of its application will allow it to sell its broadband assets which are needed by a new CATV franchisee in order to continue CATV services to Brookfield residents. The Commission's public notice of the filing appeared on September 7, 1988. A petition to deny was filed by Paragon Cable Television, Inc. (Paragon) on October 18, 1988. Applicant filed an opposition to Paragon's petition on October 25, 1988. On October 31, 1988 Paragon filed a reply to Bell's opposition.[1]

2. Bell relates that its broadband system is currently used only to provide broadband service to Telenational Communications, Inc. (Telenational), which holds a CATV franchise within the City of Brookfield. Applicant states that no other party has expressed any interest in leasing broadband service from Applicant in order to provide CATV services. According to Applicant, approximately twenty-five percent of the capacity of the system is unused and no party has expressed any interest in leasing this unused capacity for any purpose.

3. Applicant states that Telenational has entered into an agreement to sell its Brookfield franchise to Warner Cable Communication of Milwaukee (Warner). Another cable television company, American Cablevision Corporation of Brookfield (American), will act as an intermediary, first purchasing the Telenational franchise, then reselling the franchise to Warner. American had an option to purchase the Telenational franchise from Telenational. It exercised that option and contracted with Warner for sale of the franchise to Warner. *See* Applicant's letter to the Common Carrier bureau dated February 8, 1989. According to Applicant, Warner has indicated that it would not be interested in leasing broadband services from Applicant. Its agreement with American for the purchase of American's franchise requires the simultaneous purchase of Applicant's Brookfield broadband assets. Applicant and Warner have reached an agreement for the sale of its Brookfield broadband assets contingent upon the Commission's grant of its application. The sale price of the facilities is4.5 million. The net book value was 7,086,957 as of December 31, 1988. Applicant states that it understands that the Commission's order which originally granted section 214 construction authority requires that it keep this loss totally separate from Bell's regulated books. *Id.*

4. Applicant maintains that in August, 1988, the City, through its council, approved the Telenational franchise transfer to Warner and endorsed Applicant's sale of its physical assets to Warner. Bell Application at 3. The City also approved of American's involvement as an interim franchise operator pursuant to the resolution which was attached to the application. Applicant states that in order to maintain continuous CATV service to Brookfield residents, its discontinuance of service will be simultaneous with its transfer of assets to Warner. *Id.*

5. *Opposition:* Paragon acknowledges that it filed its petition eleven days beyond the deadline of October 7, 1988 established by 47 C.F.R. § 63.52(b) and (c). It argues that its submission nevertheless should be considered timely filed because it had not received effective notice of the filing of the application from either the Applicant or the Commission. Paragon contends that the public notice of the application incorrectly cited a non-existent rule section, number "63.502." Paragon Petition to Deny at 1. Moreover, it submits that, pursuant to Section 63.71(a) of the Rules, Applicant had an obligation to notify it of the application. Paragon alternatively argues that should the Commission find its petition to be untimely, it should nonetheless be considered due to "mitigating circumstances." *Id.* at 2.

6. As a background to its petition, Paragon refers the Commission to the case of *Paragon Cable Television, Inc. v. F. C. C*, 822 F.2d 152 (D.C. Cir. 1987) (*Paragon*), in which some of the issues before us were considered. Without citing the holding of the case, Paragon recounts the essence of that controversy as follows:

> Paragon was in the process of constructing a cable television system in Brookfield when the city revoked its franchise (footnote ommited) and authorized Telenational Communications, Inc. to construct in Brookfield. With the revocation Bell refused to allow further expansion of Paragon's system and instead constructed Telenational's system.

Paragon Petition to Deny at 3.

7. Paragon states that it considers the City's revocation unlawful and says that it continues to operate in a portion of the City as a result of pending litigation in *Paragon Cable Television, Inc. v. City of Brookfield*, Case No. 83-C-1686 (E.D. Wisc.). Paragon raises the question whether a violation of Section 63.54(b) of the Rules could arise by virtue of the sale of the assets by the applicant to Warner.[2] It also objects to Applicant's statement that no party is interested in leasing broadband service and states that it is interested in such a lease.

8. In its opposition to Paragon's petition, Applicant asserts that Paragon's petition was untimely. Applicant denies any obligation to give notice to Paragon under Section 63.71 of the rules. Further, it states that Section 63.71 applies only to "non-dominant carriers" and Applicant is classified as a dominant carrier according to

Competitive Carrier Rule Making, 85 F.C.C. 2d 1, at paragraph 62 (1980). Applicant also argues that Section 63.71 only requires notice to " . . . affected customers of the planned discontinuance, reduction or impairment." 47 C.F.R. § 63.71. Applicant states that it does not consider Paragon to be an affected customer because Paragon leases poles and not channel service over its broadband distribution system, and nothing in its application affects Bell's pole leases.

9. Applicant urges that the decision in *Paragon* is controlling in this matter in that while Paragon may be contesting the validity of its franchise revocation in the Wisconsin federal court, "until that case is resolved, it is appropriate for the Commission to employ a presumption of validity with respect to Paragon's franchise revocation." *Paragon* at 153. Applicant submits that without a franchise Paragon's use of Bell facilities would violate both the Cable Communications Policy Act of 1984 (Cable Act), 47 U.S.C. 541 (b)(1) and Wisconsin Bell's Tariff FCC No.40.

10. Paragon replies that 47 U.S.C. § 541(b)(1) does not apply to Paragon's Brookfield system, but that the applicable section is 47 U.S.C. § 541(b)(2), which provides that, "Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires." 47 U.S.C. § 541(b)(2). Paragon states that it has been in operation since before July 1, 1984 and consequently its operations would not violate any provision of federal law or Bell's Tariff FCC No. 40.

11. Paragon further states that it is interested in providing a pay TV service, using Bell's channel distribution system, which would not rely on over-the-air service and according to Paragon would not be defined as cable television subject to regulation under the Cable Act of 1984. Paragon Reply at 5, footnote 4.

12. *Discussion:* The initial issue before us is the timeliness of Paragon's petition. Section 63.52(c) of the Commission's rules states that:

> . . . any interested party may file a petition to deny an application within the 30 days or other time period specified in paragraph (b). 47 C.F.R. 63.52(c).

13. The Commission gave public notice of the filing of the application on September 7, 1988. *See* Public Notice Report No. D-452. Under the method prescribed for computation of time under 47 C.F.R. § 1.4, any petition to deny must have been filed by October 7, 1988. It is uncontroverted that Paragon's petition was filed on October 18, 1988, eleven days late. In general the Commission disfavors the submission of late-filed pleadings and requires at least a reasonable showing to support a motion for acceptance of such a pleading. Paragon claims it was improperly deprived of actual notice to which it was entitled under Section 63.71(a). However, that section is not applicable to the subject application because it applies only to non-dominant carriers; Applicant is a dominant carrier under 47 C.F.R. § 61.12(c). Paragon's alternative argument that it was deprived of notice because the public notice was incorrectly cited is equally without merit. We recognize that indeed there was a typographical error in the Commission's public notice of this application, publishing it as relevant to a nonexistent Section 63.50 *2* [emphasis added] as opposed to the correct Section 63.50. *See* Public Notice Report No. D-452 at 56; *see also* 47 C.F.R. § 63.50: General provisions relating to all applications under Section 214. Despite this typographical error, the notice included the following description of the application: "discontinue service on its [Wisconsin Bell, Inc.] distribution system in Brookfield, Wisconsin." *Id.* We find that the description of the application effectively cured the typographical error and adequate notice was provided. Nevertheless, on its own motion, the Bureau will consider Paragon's arguments that 214 discontinuance authority should not be granted.

14. Our analysis starts with the decisions by the Commission and by the United States Court of Appeals District of Columbia Circuit in *Paragon*. *Paragon, supra*. In *Paragon*, the court reviewed a decision by the Commission to reject a complaint filed by Paragon under 47 U.S.C. § 224, in which Paragon alleged it had been unreasonably denied pole attachments by Bell. *Paragon* at 153. Bell's asserted reason for its refusal was that Paragon's franchise had been revoked by the City and that the pole attachment agreement between petitioner (Paragon) and Bell required Paragon to possess and furnish proof of a valid franchise. *Id.* The court reasoned that in light of Congress' then-recent reaffirmation of the franchising process in the Cable Act, the Commission's approach was entirely reasonable. *Id.* The court held that, having decided that a franchise is a valid prerequisite, the Commission reasonably refused to enter the fray and address Paragon's claim that it nonetheless continued to possess a valid franchise because the City's purported revocation was illegal. That issue was – and is – being litigated in the federal district court in Wisconsin. Until that case is resolved, it is appropriate for the Commission to employ a presumption of validity with respect to the franchising authority's actions vis-a-vis the franchise. *Id.* at 153-54. There is no credible argument to the contrary offered by Paragon in its petition. We find no meaningful distinction between the leasing of distribution service and pole attachment rights in terms of a reasonable requirement that the proposed lessee hold a valid franchise.

15. We also note that Bell Tariff FCC No. 40 states that any broadband customer shall be responsible for obtaining any authority to provide cable television service or other services as may be required by law. Tariff FCC No. 40, § 2.4. The Cable Act states that a cable operator may not provide cable service without a valid franchise. 47 U.S.C. § 541(b)(1). It appears that Applicant could not lease its broadband service to Paragon for provision of cable television service without violating its tariff and participating in a violation of the Cable Act of 1984.

16. Although Wisconsin argues that § 541 of the Cable Act prohibits a lease to Paragon, Paragon counters that the applicable section is Section 541(b)(2) which states that, "Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires." 47 U.S.C. § 541(b)(2). Paragon submits that because it was operating a system in Brookfield without a franchise before that date its operations would not violate any provision of federal law. Paragon Reply at 4. Paragon fails, however, to address the second clause of § 541(b)(2): " . . . unless the franchising authority so requires." 47 U.S.C. § 541(b)(2). Nothing in the record indicates that the City does not require franchising. In support of such a finding, Paragon states, "the City . . . is presently resisting

Paragon's efforts to resume franchised operation rather than requiring it to obtain a franchise." *Id.* . We see no reason to interpret the City's revocation of Paragon's franchise and its subsequent resistence against Paragon's efforts to resume franchised operation as a sign of the City's willingness to allow it to operate without a franchise. Paragon cites no credible evidence that the City does not require a franchise for operation. Therefore, Paragon's reliance on 47 U.S.C. § 541(b)(2) is misplaced.

17. Alternatively, Paragon states that it is interested in providing "other services not subject to 47 U.S.C. § 541(b)(1) on the available 25% of Wisconsin's system and will seek to obtain any necessary authority as it arranges for service from Bell." Paragon Reply at 5. In a footnote to that statement Paragon defines its plan as "a pay TV service which would not rely on over-the-air service, and would therefore not be defined as cable television." *Id.*

18. Section 541(b)(1) of the Cable Act requires a franchise for the provision of " . . . cable service." 47 U.S.C. § 541(b)(1). Section 522(5)(A) of that Act defines cable service as: "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, ..." 47 U.S.C. § 522(5)(A). Paragon fails to distinguish its plans from the applicability of the Cable Act. Furthermore, Paragon fails to state the extent of such plans to date nor does it furnish any information beyond the limited explanation above to define its proposed use of the channel distribution system. We note that heretofore Paragon has not made use of the system in this manner and cites no attempts to provide this service.

19. We find that Paragon continues to lack a valid franchise. Without a valid franchise Paragon is not a legally viable customer for Bell's broadband channel service. No other entity has expressed an interest in leasing broadband channel service. For the reasons discussed herein, we find that the Applicant has demonstrated that the discontinuance of its broadband distribution service in the City furthers the public interest for the residents of Brookfield to continue receipt of cable television service by a lawfully franchised provider.

20. Based upon the record herein, IT IS HEREBY CERTIFIED, that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. 0.291, that Application File No. W-P-D-347 IS GRANTED and Wisconsin Bell, Inc. IS AUTHORIZED to discontinue its above-mentioned service.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] On November 9, 1988 Applicant filed a response to Paragon's reply, a pleading not authorized by the rules or requested by the Commission. *See* 47 C.F.R. § 63.52(c) and 47 C.F.R. § 1.45(c). Applicant appears to raise no new substantive issues in its unauthorized pleading which would affect the decision in this case. On November 9, 1988 Paragon filed a letter, "waiving its right to object to Wisconsin's filing of an unauthorized pleading subject to being given the right to file a responsive pleading." Paragon letter to the Commission, November 9, 1988 at 1. Although Paragon may choose not to object to an unauthorized pleading it does not possess authority to waive 63.52(c) or 1.45(c) of the Commission's rules. 47 C.F.R. § 63.52(c) and 47 C.F.R. § 1.45(c). Applicant's November 8 pleading will be treated as an informal comment. *See, e.g.*, 47 C.F.R. § 21.30(b).

[2] Section 63.54(b) of the rules states in relevant part that no telephone common carrier shall provide channels of communications or other rental arrangements to any entity where such entity is controlled by such carrier and such facilities are to be used for the provision of video programming to the public. 47 C.F.R. § 63.54(b). In its opposition Applicant states no such control exists. Applicant Opposition at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTEL CORPORATION AAD 8-1921

Petition for Clarification
of Section 32.27(d) of the
Commission's Rules Governing
the Valuation of Services
Provided to a Telephone
Carrier by an Affiliated
Company

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1989; Released: March 9, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 3, 1988, Centel Corporation filed a petition for clarification of Section 32.27(d) of the Commission's Rules,[1] which governs valuation of services in transactions between regulated telephone carriers and their nonregulated affiliates.[2] The rule provides, *inter alia*, that services provided to a carrier by an affiliate must be valued at the market price if the affiliate also provides the same services to third parties. In the absence of third party transactions, services must be valued at the affiliate's cost.

2. In its petition, Centel seeks clarification as to the applicability of Section 32.27(d) to situations in which a carrier purchases services from an affiliate pursuant to a competitive bidding procedure. Specifically, Centel asks whether the regulated telephone company may record the price for such services at the lowest competitively bid price irrespective of whether the affiliate has also provided the same services to unaffiliated entities. For the reasons set forth below, we decline to adopt the interpretation of the present rule Centel urges upon us. Therefore, we deny Centel's petition for clarification of Section 32.27(d).[3]

II. BACKGROUND

3. The *Joint Cost Order* established principles and rules governing the accounting separation of carriers' regulated and nonregulated costs, and the valuation of transactions between regulated carriers and their nonregulated affiliates. The *Joint Cost Order* discussed two basic transactions between affiliates: (1) the transfer of assets, from an unregulated affiliate to a regulated carrier, or vice versa; and (2) the provision of services, from an unregulated affiliate to a regulated carrier, or vice versa. Drawing a distinction between transactions involving assets and those involving services, the *Joint Cost Order* established separate rules governing the transfer of assets and the provision of services between affiliates. This distinction was based on problems of valuation and characteristics unique to each type of transaction.[4] The *Joint Cost Order* established these rules in order to prevent improper shifting of costs from the unregulated side to the regulated side of a company's operations in transactions that are not negotiated at arms-length.[5]

4. Section 32.27(d) of the Commission's Rules governs the valuation of services in transactions between regulated carriers and their nonregulated affiliates. The rule specifies three different methodologies for valuing services between affiliates, depending on the amount and quality of information available regarding the market price for those services. First, when a carrier provides services to an affiliate pursuant to a tariff, the tariffed rate serves as the measure of value of the service. In such a situation, the carrier must record the value of services in the appropriate revenue accounts at the tariffed rate. The second method applies when the affiliate provides services to the regulated carrier, and the same services are also provided by the affiliate to unaffiliated persons or entities. In this case, the price charged to the unaffiliated third parties serves as the measure of value and establishes a market price. The carrier must record these services at the market rate. The third method involves a situation when a carrier provides substantially all of a service to or receives substantially all of a service from an affiliate, but the service is not generally provided to unaffiliated persons or entities. In this case, there is no reliable indicia of value, and the rule requires the carrier to record the value of services received at cost – that is, the affiliate's cost of providing the service.[6]

III. CENTEL'S PETITION

5. Centel seeks clarification of Section 32.27(d) when applied to a regulated telephone carrier's purchase of services from a nonregulated affiliate through a competitive bidding process. In the situation Centel describes, a carrier would seek competitive bids for a particular service from unaffiliated third parties as well as its nonregulated affiliate. Under Centel's proposed interpretation of the rule, if the carrier then purchases the service from its affiliate, the carrier would record the value of the service on its regulated books at the lowest bid received in the competitive bidding process. Centel proposes valuation at the lowest bid, irrespective of whether the affiliate has also provided the same services to unaffiliated third parties. Centel contends that this interpretation of the rule furthers the Commission's goal of protecting ratepayers from the danger of cross-subsidization of unregulated activities by the regulated carrier, while encouraging carriers to procure services in the most efficient manner possible.

6. In support of its proposed interpretation of the rule, Centel raises the basic issue of whether services are fungible in nature. Centel contends that individual services are often by their very nature unique or tailored to individual customer circumstances, such as might be the case with certain construction or engineering services. Centel maintains that neither the rules nor the Commission's Orders adopting them address the pricing of services which are not fungible, such that precisely the "same" services cannot be provided to more than one customer.[7] Centel submits that if services are not fungible, a competitive bidding process may be the only way to

establish the market price for those unregulated services. Centel contends that arms-length bids by multiple unaffiliated service providers serve as a reliable indicator of the market rate for the service, especially when the service is unique and not offered to third parties. According to Centel, the competitive bidding process establishes the market rate for the service, and this market rate should be used as the proper measure of value on the carrier's books.

7. Centel maintains that this interpretation of the rule will further the Commission's goal of assuring that ratepayers do not bear excessive costs for services provided by unregulated affiliates to regulated carriers. In its view, the competitive bidding process assures protection against cross-subsidization of the affiliate's competitive services, and enables the carrier to find the best price available in the marketplace. In contrast, Centel asserts that if carriers must record the value of services at cost rather than at the lowest bid price, the Commission's objective of protecting ratepayers from excessive costs will be frustrated. Centel argues that rejection of its proposal would discourage carriers from purchasing services from their affiliates, even when an affiliate had the low bid. According to Centel, this would have the effect of actually inflating the rate base, to the detriment of ratepayers. Centel also cites administrative convenience as a factor supporting its interpretation of the rule, claiming that recording transactions at a competitively bid price should avoid the difficulties involved in comparing affiliate transactions with "comparable" transactions between the service provider and unaffiliated third parties.

8. Finally, Centel suggests three possible safeguards to ensure that the low bid used to record the value of the service is obtained through a *bona fide* competitive bidding process. Centel states that the Commission might require the carrier to solicit competitive bids from a minimum number of unaffiliated service providers, as a prerequisite to recording the low bid price in the carrier's regulated accounts. Further, the affiliated bidder might be required to submit its bid without the benefit of information concerning the bids submitted by others. Lastly, Centel notes that there may be legitimate business reasons for a carrier to select its affiliate's bid over a lower bid from an unaffiliated third party, such as the perceived quality of service. In this situation, Centel suggests that the carrier be required to record the value of the service received from its affiliate at the *lower* of the affiliate's bid price or the lowest price bid by an unaffiliated bidder (the "low bid safeguard").

IV. PARTIE' COMMENTS

9. Five parties filed comments in this proceeding.[8] Centel and the Ad Hoc Telecommunications Committee (the Committee) filed reply comments. Parties commenting on Centel's petition can be divided into two groups. The first group, consisting of the two state public service commissions (NYDPS and DCPSC) and the Committee, opposes Centel's petition in its entirety. The second group consists of three local exchange carriers (Contel, BellSouth, and Pacific Bell). These carriers support the general concept of recording services provided by a nonregulated affiliate at the affiliate's bid price derived in a competitive bidding procedure. However, they unanimously oppose Centel's proposed low bid safeguard requiring recordation of the *lowest* bid received when the carrier purchases services from its affiliate at a higher price.[9]

10. The public service commissions question the inherent integrity of any competitive bidding procedure involving a regulated carrier and its nonregulated affiliate. NYDPS opposes the use of a market rate in any instance when the market rate exceeds the affiliate's cost (even when the affiliate provides the same service to third parties, as the rule now provides). It argues that the affiliate's cost should always be the proper measure of value in order to prevent cross-subsidization.[10] DCPSC also disputes Centel's claim that the bidding process effectively prevents cross-subsidization.[11] Both are concerned about the possibility of collusion between the carrier and its affiliate, or between the bidding affiliate and other bidders, such that the "low bid" might still be inflated to the detriment of ratepayers.[12] DCPSC also suggests that Centel's low bid safeguard, allowing the carrier to purchase the service from its affiliate at a price higher than the lowest bid received (but recording at the lowest bid), undercuts the legitimacy of the bidding process and does not manifest the characteristics of arms-length bidding. As a result, DCPSC contends, other bidders would soon realize that bidding on the carrier's contracts would not be worthwhile and would decline to participate, causing the process to break down.[13] In short, the public service commissions do not share Centel's faith in the ability of the competitive bidding process to protect ratepayers from bearing excessive costs of nonregulated services, and do not view Centel's proposed safeguards as sufficient to prevent abuse. In its reply comments, the Committee echoes the concerns of the public service commissions and urges us to deny Centel's petition.[14]

11. In reply, Centel asserts that the public service commissions do not raise any serious questions concerning the reasonableness of Centel's request which warrant denial of its petition.[15] Centel contends that its proposed safeguards are sufficient to protect against cross-subsidization and insure the integrity of the bidding process.[16] As to the fears of the public service commissions that there may be collusion among bidders or other abuse, Centel points out that there are civil and criminal remedies available to police any possible misconduct, in addition to its own proposed safeguards.[17]

12. The carriers filing comments support the use of a competitive bidding process to determine a market rate for services provided by a nonregulated affiliate to a regulated carrier, embracing the basic rationale advanced by Centel. However, they unanimously oppose Centel's low bid safeguard. They all agree that there may be legitimate business reasons for choosing an affiliate's bid over a lower bid from a third party, but they argue that the actual price paid to the affiliate should be used as the market rate, not the lowest bid received. BellSouth shares DCPSC's concern that the low bid safeguard may cause legitimate third party bidders to withdraw from the bidding process.[18] Pacific Bell asserts that a carrier, after choosing an affiliate's higher bid for legitimate reasons, should not then be penalized for making a sound business judgment by being forced to record the transaction at the affiliate's cost.[19] Contel notes that the Centel low bid safeguard would prevent the carrier from earning a return on the incremental capital investment between the affiliate's bid and the lowest bid.[20] Contel further asserts that the Commission can identify abusive conduct and prevent

cross-subsidization without the need for Centel's proposed low bid safeguard.[21] In short, the carriers support Centel's basic proposal regarding the competitive bidding process to establish the market rate for services, but feel that the low bid safeguard goes too far. As Contel states, Centel "throws the baby out with the bath water" by including its low bid safeguard in its petition.[22]

13. In its comments, Pacific Bell suggests an alternative to Centel's low bid safeguard in order to prevent cross-subsidization. Pacific Bell proposes instead that a carrier's acceptance of an affiliate's bid that is not priced at the lowest responsive bid price be subject to review as part of the annual attestation audit required by the Commission.[23] Under Pacific Bell's proposed alternative, carriers could be required to retain their rationale supporting acceptance of an affiliate's bid which was not the lowest price.[24] In reply, Centel states that it believes its low bid safeguard is simpler and easier to enforce, but it acknowledges that the Pacific Bell proposal offers the promise of achieving the same protection against cross-subsidization.[25] While Centel expresses some uncertainty as to how the Pacific Bell proposal would be implemented, Centel states that it has no problem with its use and defers to the Commission's judgment as to the viability of Pacific Bell's proposed alternative.[26]

V. DISCUSSION

14. We decline to adopt the interpretation of Section 32.27(d) advanced by Centel, and therefore deny its petition for clarification. Centel raises a situation, *i.e.*, the provision of unique services from a nonregulated entity to its affiliated regulated carrier pursuant to competitive bidding, that is not specifically described in any of the three situations set out in the present rule. Centel urges us to expand our definition of "market rate", contained in the second situation outlined in Section 32.27(d), to include the lowest bid price received in a competitive bidding process, even though the affiliate does not also provide the same service to unaffiliated third parties as that part of the rule clearly requires. We believe Centel's proposed interpretation is at odds with the structure and clear meaning of Section 32.27(d), violates its underlying rationale, and could in any event be implemented only after a Rule Making proceeding.

15. First, we reject Centel's assertion that "[n]either the rules nor the Commission Orders adopting them . . . address the pricing of services which are not fungible . . . such that precisely the 'same' services cannot be provided to more than one customer."[27] The pricing of such unique, nonfungible services is governed by the third situation outlined in Section 32.27(d). Under this part of the rule, when an unregulated affiliate provides services to its affiliated regulated carrier, and does not provide the same service to third parties, the service must be recorded on the carrier's regulated books at the affiliate's cost of providing the service. A unique service which cannot be provided to others clearly falls within the third situation set out in Section 32.27(d). Thus, since our rule does in fact address the pricing of services that are not fungible, one of Centel's major premises supporting its proposed interpretation of the rule is flawed.

16. Although competitive bidding is not specifically mentioned in Section 32.27(d), the competitive bidding process Centel describes properly falls within the third situation outlined in the rule. Under Centel's scenario, the affiliate provides a unique service only to the regulated carrier and does not provide the service to unaffiliated third parties. Since there are no third party transactions, there is no third party price available to serve as a guide in establishing a reliable market rate for the service. When reliable information as to market price is not available the danger of cross-subsidization increases, and thus the rule requires the carrier to record the value of the service at cost, rather than market rate.

17. At the very heart of Centel's proposal is the premise that a competitive bidding process will establish a reliable market rate for the service and will protect the ratepayer from cross-subsidization. While the competitive bidding process provides some indicia of market price, we are not persuaded that the low bid received in a competitive bidding process represents as reliable a measure of market value as a tariff rate or the price charged to unaffiliated third parties in an arms-length transaction.[28] In our view, Centel has not demonstrated that a competitive bidding process will consistently produce a market rate for the service that is adequate for our cost allocation purposes. Given this uncertainty, we cannot adopt an interpretation of the present rule which might increase the opportunity for carriers to engage in cross-subsidization.

18. Centel's proposed safeguards do not provide adequate assurance that the bidding process will consistently yield a fair "market price". Its first suggestion, that the Commission could require that the carrier solicit bids from a minimum number (*e.g.* three) of unaffiliated service providers, reduces, but does not eliminate, the possibility that abuse of the process will take place. Centel's second proposed safeguard is an unsupported assertion that the Commission could require "that the bids be truly competitive, *i.e.*, that the affiliated bidder submit its bid without the benefit of information concerning the bids submitted by other firms."[29] While we agree that the affiliated bidder should not be privy to information concerning bids from unaffiliated bidders, we are not entirely sure how the bidding process could be policed in order to achieve this result. Neither Centel nor any other carrier supporting the competitive bidding proposal offers any specifics as to how the Commission might implement and enforce this requirement. Thus, this proposed safeguard adds no real protection against abuse of the bidding process.[30]

19. Centel's third safeguard is the so-called low bid requirement. This safeguard would allow a carrier to consider nonprice factors in deciding whether to purchase a service from its affiliate at a price higher than the lowest bid received in the bidding process, so long as the carrier recorded the transaction on its books at the lowest bid received. Centel states that it suggested this safeguard "in order to address the concern that the carrier's retention of the right to consider factors other than price in awarding a competitively bid contract introduced an element of discretion into the process that some might argue could be used to cross-subsidize the unregulated affiliate."[31]

20. We do not disagree with Centel and the other carriers that there may be legitimate business reasons for purchasing services from an affiliate when the affiliate is not the low bidder. However, our current rules do not prevent consideration of nonprice factors, such as perceived advantages in quality or expertise, when a carrier makes a purchasing decision from among competitive bids. A regulated carrier remains free under Section 32.27(d) to purchase services from its affiliate at a price

higher than bids received from unaffiliated third parties, so long as the carrier records the value of the service at cost. This requirement is designed to protect ratepayers from bearing the burdens of improper transfer pricing, and reflects the fact that the service being provided is a shared service between the regulated carrier and its nonregulated affiliate.[32] In declining to revise Section 32.27(d) in the face of similar arguments, the Commission characterized this requirement "as essential to the integrity of our cost allocation rules."[33] The Commission rejected the suggestion that the marketplace by itself, absent the requirement that services be recorded at cost, provides a valuation standard which adequately protects ratepayers from cross-subsidy. The Commission expressed concern over the potential for abuse and difficulties with monitoring such a valuation scheme. The Commission concluded that "by requiring carriers and their affiliates to allocate costs pursuant to the cost allocation standards, we can ensure that an auditable measure of the cost of the service is available."[34]

21. Centel's low bid safeguard does not adequately address the problems and concerns noted by the Commission in the *Reconsideration Order*. The low bid safeguard does not eliminate the possibility of collusion between the carrier and its nonregulated affiliate, or among the various bidders, such that the lowest bid may be inflated to the detriment of ratepayers. Thus, the possibility of cross-subsidy remains.[35] Moreover, to the extent that the lowest bid still exceeds the affiliate's cost, ratepayers receive no benefit from the carrier's use of the affiliate to provide the service. The low bid safeguard simply does not solve the basic problem that ratepayers are potentially worse off under Centel's proposal than if the carrier records the value of the service according to the Commission's cost allocation standards. Given the Commission's concerns over possible abusive practices, and its firm resolve to protect ratepayers by relying on cost as a measure of value when no other reliable indicia is available, we cannot accept Centel's low bid proposal as a viable safeguard for the protection of ratepayers' interests.

22. In conclusion, our primary goal in adopting affiliate transaction rules was to prevent cost shifting to ratepayers by means of improper transfer pricing.[36] Having found Centel's proposed safeguards inadequate to prevent abuse and insure a truly competitive bidding process, we cannot adopt the strained interpretation of Section 32.27(d) Centel urges upon us. Embracing Centel's flawed proposal would be inconsistent with our goal of protecting ratepayers from cross-subsidization of unregulated activities. Thus, we decline Centel's invitation to interpret Section 32.27(d) in this manner.[37]

VI. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Petition for Clarification filed by the Centel Corporation on March 3, 1988 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §32.27(d) (1987).

[2] Section 32.27 was adopted in CC Docket 86-111. *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987), (*Reconsideration Order*), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *petition for review pending, Southwestern Bell Corp. v. FCC*, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987).

[3] Although Centel filed its petition in CC Docket 86-111 as a request for "clarification", we are treating the petition as a request for declaratory ruling under Section 1.2 of the Rules, and are resolving the issue pursuant to delegated authority.

[4] *See Joint Cost Order*, 2 FCC Rcd at 1336, paras. 294-299; *Reconsideration Order*, 2 FCC Rcd at 6293-6298, paras. 91-135.

[5] *Joint Cost Order*, 2 FCC Rcd at 1334, 1335, paras. 284, 290; *Reconsideration Order*, 2 FCC Rcd at 6293, para. 91.

[6] The affiliate's cost of providing the service, for purposes of recording the value of the service on the carrier's regulated books, is determined according to the Commission's cost allocation standards enunciated in the *Joint Cost Order*. These standards incorporate a fully distributed costing methodology. As the Commission observed in the *Joint Cost Order*, "[w]hen affiliates provide shared services to each other that are not being provided to unaffiliated persons or entities, the costs must be apportioned in a manner that complies with the standards and procedures for the apportionment of joint or common costs between the regulated and nonregulated operations of the carrier entitity." *Joint Cost Order*, 2 FCC Rcd at 1336, para. 299. The Commission's cost allocation standards permit a return on investment to be included in the cost to be apportioned. *Reconsideration Order*, 2 FCC Rcd at 6298, para. 133.

[7] Petition at 3.

[8] Centel's petition was placed on public notice. *See* 3 FCC Rcd 1784 (1988). The following parties filed comments: New York State Department of Public Service (NYDPS); Public Service Commission of the District of Columbia (DCPSC); Contel Corporation; BellSouth; and Pacific Bell.

[9] BellSouth states in its comments that it opposes Centel's proposal. However, BellSouth supports the competitive bidding process as a viable alternative to establishing a market rate for recording the value of services provided by a nonregulated affiliate to a regulated carrier. BellSouth's opposition to Centel's petition focuses exclusively on Centel's proposed safeguard requiring the use of the low bidder's price when the affiliate is selected and it is not the low bidder. Presumably, BellSouth would support Centel's petition absent this safeguard. BellSouth Comments at 2-4.

[10] NYDPS Comments at 2-3.

[11] DCPSC Comments at 2.

[12] *See* NYDPS Comments at 3; DCPSC Comments at 2-3.

[13] DCPSC Comments at 3.

[14] Reply Comments of the Committee at 3.

[15] Centel Reply Comments at 4.

[16] *Id.* at 5-6.

[17] *Id.* at 5.

[18] BellSouth Comments at 4.

[19] Pacific Bell Comments at 4.

[20] Contel Comments at 4.

[21] *Id.*

[22] *Id.* at 3.

[23] Pacific Bell Comments at 4-5.

[24] *Id.*

[25] Centel Reply Comments at 8.

[26] *Id.*

[27] Petition at 3.

[28] *See Reconsideration Order*, 2 FCC Rcd at 6297, para. 131 (rejecting the argument that the marketplace will adequately regulate abusive practices and provide a reliable market value for a service when a tariff or prevailing price to third parties is unavailable).

[29] Petition at 6.

[30] In its Reply Comments, Centel notes that there are civil and criminal remedies available to address collusion among the bidding parties. Centel Reply Comments at 5. However, these remedies are available only after abuse is detected and proven. While they may provide some slight deterrant to parties apt to abuse the bidding process, they clearly do not provide adequate assurance that abuse will not occur in the first place.

[31] Centel Reply Comments at 8.

[32] *Reconsideration Order*, 2 FCC Rcd at 6297, para. 132.

[33] *Id.*, para. 130.

[34] *Id.*, para. 131.

[35] Pacific Bell urges us to reject Centel's low bid safeguard, but its own alternative safeguard *(see* para. 13, *supra)*, does not resolve the problem of the Commission having to evaluate the qualitative and subjective factors surrounding a carrier's decision to purchase a service from an affiliate when that affiliate is not the low bidder. Pacific Bell's alternative simply shifts this difficult task from the Commission to the independent auditor. Therefore, we do not consider it a viable safeguard sufficient to protect against cross-subsidization.

[36] *Joint Cost Order*, 2 FCC Rcd at 1335, para. 290; *Reconsideration Order*, 2 FCC Rcd at 6293, para. 91.

[37] We note that a petition for clarification might not be appropriate when, as here, petitioner seeks an interpretation of the rule which contradicts its plain meaning. When a petitioner believes a particular rule does not adequately address a novel situation, the proper approach is a petition for rule making to modify the current rule.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TPI TRANSMISSION
SERVICES, INC.,
Complainant,

v. File No. E-88-39

PUERTO RICO TELEPHONE
COMPANY, and
PUERTO RICO
COMMUNICATIONS AUTHORITY,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1989; Released: March 9, 1989

By the Chief, Common Carrier Bureau:

1. Before the Bureau is a motion filed by the Puerto Rico Telephone Company (PRTC) on February 12, 1988, asking that we dismiss a formal complaint by TPI Transmission Service, Inc. (TPI).[1] For reasons discussed below, we grant PRTC's motion.

I. CONTENTIONS OF THE PARTIES

2. In its complaint, TPI alleged that PRTC and the Puerto Rico Communications Authority (PRCA) had engaged in unreasonable and discriminatory practices by imposing access and per minute charges on calls made to TPI's paging and conventional mobile telephone units that differ from similar charges imposed on calls to PRTC's cellular telephone units. TPI further alleged that PRTC and PRCA also had imposed recurring charges for the assignment of numbers to its paging customers in contravention of Commission policy.[2] TPI contends that the disparate treatment of local calls to its paging units and conventional mobile units, on the one hand, and to PRTC's own cellular telephones, on the other hand, constitutes discriminatory pricing and predatory practices in violation of sections 201 and 202 of the Communications Act (the Act). [3] TPI seeks a cease and desist order, imposition of forfeitures,[4] unspecified compensatory damages, and1 million exemplary damages.[5]

3. In support of its motion to dismiss the complaint, PRTC contends, *inter alia*, that this dispute is a local matter over which the Commission has no jurisdiction under section 2(b) of the Act, 47 U.S.C. § 152(b), because TPI failed to allege or show that any interstate communications are involved in its public mobile or paging services in Puerto Rico.[6] PRTC notes that the charges at issue are for local mobile radio and paging and states that such charges were established by the Puerto Rico Telephone Authority (the PRTA) pursuant to the Puerto Rico Uniform Rate Revision and Modification Act, Law No. 21, enacted May 31, 1985.[7] PRTC denies that its charges violate the Act or Commission policy stating that it charges only a minimal and reasonable amount to TPI for interconnection. Although a showing of unreasonable discrimination with regard to a "like communication service" is necessary to establish a violation of section 202(a),[8] PRTC contends that TPI never established either that cellular, mobile and paging are, in Puerto Rico, "like services" or that any differences in PRTC's charges for interconnecting those services were unreasonable.[9]

II. DISCUSSION

4. TPI relies on the Commission's March 1986 policy statement that "telephone companies may not impose recurring charges solely for the use of [telephone] numbers".[10] The Commission there stated:

> In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal, concern. We therefore express no view as to the desirability or permissibility of particular compensation arrangements, such as calling-party billing, *responsibility for the costs of inter - connection*, and establishment of rate centers. Such matters are properly the subject of negotiations between the carriers as well as state regulatory jurisdiction . . . . (footnote omitted, emphasis added)[11]

TPI contends that certain charges in PRTC's local intrastate tariff contravene such policy.[12] PRTC denies TPI's allegation that the monthly recurring charges in question are for the assignment of telephone numbers and asserts that the charges were designed to recover appropriate costs of switching and merely make reference to the numbers.[13] PRTC submitted evidence indicating that such charges recoup costs incurred at its terminating central office for switching a call to the outpulsing trunk port dedicated to the mobile carrier serving the called mobile number. PRTC asserts that, while there were other ways it could have designed its tariff rates to recover these costs, it found it most efficient and equitable to charge for this service on a monthly per 100 number basis.[14] PRTC's evidence indicates an annual revenue requirement for central office numbers for mobile radio, cellular radio, radio signalling and voice mail services of35,984 and an annual requirement for outpulsing trunk ports of98,101.[15] TPI takes issue with such figures and contends that they are not based on actual cost allocations, cost studies, effective tax rates or taxes actually paid and appear to be "contrived".[16] TPI contends, *inter alia*, that the depreciation reserves are understated, the maintenance and operating expenses are merely estimates, that no showing has been made that PRTC actually made contributions to the Commonwealth of Puerto Rico in the amount of 35% of its earned return in lieu of taxes, and that PRTC's methodology for computing federal taxes paid is inappropriate even if it were subject to such taxes.[17]

5. While TPI takes issue with PRTC's capital/debt structure, cost allocation methodology, and calculations and while the specific amount of the charges at issue thus may be subject to challenge, TPI has not sustained its burden

of demonstrating that such charges are not needed to compensate PRTC for actual work performed and that they are merely for assignment of NXX numbers as TPI alleges. TPI has failed to show that this dispute implicates a federal interest that warrants our intervention. Absent evidence that a substantial federal question is involved, the Commission will not assert jurisdiction over matters involving rates for intrastate services of a common carrier. *Radiotelephone Communicators of Puerto Rico, Inc. v. Puerto Rico Communications Authority*, 3 FCC Rcd 2458, 2459 (1988). If TPI is dissatisfied with the approval of the subject charges by the PRTA, an agency of the Commonwealth of Puerto Rico, its proper recourse is to appeal the matter to the appropriate local court. TPI has not met its burden of showing that PRTC's charges for interconnecting services, which charges apparently were approved by the PRTA, contravene any provision of the Communications Act or Commission rule or order.[18] Even if TPI had shown that interstate services were involved, which it has not, it failed to show that its interconnection functions and service for cellular, mobile and paging in Puerto Rico are "like services" or that any differences in PRTC's charges for interconnecting those services were "unjust or unreasonable" or "undue or unreasonable" within the meaning of section 202(a) of the Act.

III. CONCLUSION AND ORDERING CLAUSES

6. In view of the foregoing, we conclude that TPI has not shown that it is entitled to any of the relief it seeks and its complaint is dismissed.[19]

7. Accordingly, pursuant to authority delegated in section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, IT IS ORDERED that the Motion to Dismiss, filed by the Puerto Rico Telephone Company on February 12, 1988, IS GRANTED.

8. IT IS FURTHER ORDERED that the Complaint filed by TPI Transmission Services, Inc. on December 15, 1987, IS DISMISSED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] In addition to the subject motion and complaint, filed on December 15, 1987, we have before us an answer, timely filed by PRTC on February 12, 1988, a reply to answer and to motion to dismiss, filed by TPI on March 15, 1988, an evidentiary response to Letter from Chief, Enforcement Division, to Paul J. Berman (October 14, 1988) timely filed by PRTC on November 14, 1988; a request for leave to comment on PRTC's evidentiary response filed by TPI on December 20, 1988, a motion for summary judgment filed by PRTC on December 21, 1988, a motion to accept late-filed pleading and an opposition to motion for summary judgment, both filed by TPI on January 5, 1989, an affidavit of Hugh Larkin, Jr. transmitted by letter to Gregory Vogt from George L. Lyon, Jr. (Jan. 12, 1989), and a reply to opposition to motion for summary judgment and opposition to motion to accept late-filed pleading filed by PRTC on January 13, 1989.

[2] After PRCA filed a motion to dismiss and an answer to TPI's complaint, we granted TPI's March 15, 1988 motion to dismiss its complaint insofar as it had been directed against PRCA. TPI Transmission Services, Inc. v. Puerto Rico Telephone Company, 3 FCC Rcd 1829 (1988). A third count to the complaint, concerning imposition of certain alleged overcharges, was also dismissed at TPI's request. *Id.*

[3] 47 U.S.C. § 201 proscribes any unjust or unreasonable charge, practice, classification, or regulation for and in connection with interstate or foreign communication by a common carrier. 47 U.S.C. § 202(a) makes it unlawful for any carrier engaged in interstate or foreign communication by wire or radio:

> to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[4] 47 U.S.C. § 202(c) provides for forfeitures of500 for each violation of section 202(a) and25 for each day of the continuance of such offense.

[5] TPI has not shown that we have authority to award punitive damages. *See* Comark Cable Fund III, 100 FCC 2d 1244, 1257 at n.51 (1985) (denying request for punitive damages), *remanded on other grounds*, Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987), *reaffirmed after remand*, Comark Cable Fund III, 3 FCC Rcd 3096 (1988), *appeal docketed*, No. 88-1521 (D.C. Cir. July 22, 1988).

[6] 47 U.S.C. § 152(b) provides, in pertinent part, as follows:

> . . . subject to the provisions of section 301 . . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

PRTC relies in this connection on Louisiana Public Service Commission v. FCC, 476 U.S. 355, (1986); California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986); Indianapolis Telephone Co. v. Indiana Bell Telephone Co., 2 FCC Rcd 2893 (1987) (FCC will not become involved with financial compensation arrangements between cellular carrier and local landline telephone company that relate solely to intrastate common carriage); The need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910 (1987) (FCC jurisdiction over charges for interconnection of cellular and paging systems is limited to interstate cost of interconnection and ensuring interconnection is provided for interstate service). Although PRTC also relies on section 221(b) of the Act as precluding jurisdiction in this matter, that section concerns interstate telephone exchange services subject to regulation by state or local governmental authority.

[7] Motion to Dismiss at 2.

[8] *See* note 3, *supra*.

[9] PRTC states that it has extended to TPI and other carriers an option to use the same access and per minute charges for their mobile customers as PRTC uses for its cellular customers. Answer at 2. Per minute charges are not available to paging systems because paging communications generally last less than a minute. *Id.* at 9.

[10] In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, FCC 86-85 (released March 5, 1986), 51 Fed. Reg. 10838, 59 Rad. Reg. 2d (P&F) 1275, Appendix B at para. 4, *reconsid.*, 2 FCC Rcd 2910 (1987), *pet. for further reconsid. pending*, (*Cellular System Interconnection Policy*).

[11] *Id.*, 59 RR 2d at 1284-85. Where the telephone company owns the switch serving the cellular network and performs the origination and termination of both incoming and outgoing calls, the Commission has stated that recurring charges may be appropriate. *Id.* 2 FCC Rcd at 2918 n.33.

[12] Page K-1-8 of PRTC's tariff provides, in pertinent part, as follows:

> Groups of Telephone Numbers
>
> 1. There shall apply for the groups of telephone numbers provided by the Company for Mobile Radio, Cellular Radio and Voice Mail Services the following tariffs for Single Number Access in Digital Central Offices designated by the Company.
>
> a. Monthly rent for each group of 100 numbers, assigned by the Company to the Carrier. 30.00.

PRTC Exhibit 1 at 8.

[13] Affidavit of Jose A. Cela of November 10, 1988 at 4.

[14] *Id.* at 3-4. Although TPI was afforded an opportunity until November 27, 1988 to file a response to PRTC's evidentiary filing of November 14, 1988 including the affidavit of Jose A. Cela, *supra*, its response was untimely filed on January 12, 1989. The thrust of this filing is a critique of several aspects of PRTC's exhibit in support of the annual revenue requirements for its intrastate tariff filing in Puerto Rico. We have reviewed this material and do not find it probative for resolution of the issues at bar in this proceeding.

[15] Affidavit of Jose A. Cela, Exhibits 2, 3.

[16] Affidavit of Hugh Larkin, Jr. at 6, 10.

[17] TPI believes that, as part of a State government, PRTC is exempt from the payment of federal taxes.

[18] Cellular carriers are exchange carriers and generally presumed not to be engaged in interexchange service. MTS/WATS Market Structure, 97 FCC 2d 834, 882 (1984); *see Cellular System Interconnection Policy*, *supra*, 59 RR 2d at 1284 n.3. In a complaint proceeding, the burden of proof lies with the complainant to show a violation of the Communications Act or the Commission's Rules. GSA v. AT&T, 2 FCC Rcd 3574, 3579 at n.31 (1987).

[19] Our order herein is not intended and should not be construed as indicating that we concur in affirmative defenses III, IV, and V of PRTC to the effect that a section 2(b)(2) "connecting carrier" within the meaning of 47 U.S.C. § 153(u) is not subject to sections 208 and 209 of the Act, that the Commission could not impose liability for damages against PRTC in an appropriate case even if it is a connecting carrier, and that a complaint filed pursuant to section 208 must show that complainant sustained damages as the result of the alleged wrongdoing. *See* Com Services, Inc. v. Murraysville Telephone Co., Memorandum Opinion and Order, FCC 85-553, at para. 14 (released October 17, 1985) (all carriers are subject to Act's damage provisions). *See also* CCI Cablevision, 103 FCC 2d 600, 611 at n.24 (1985), *remanded on other grounds*, Northwestern Indiana Telephone Co. v. FCC, *supra* (connecting carriers are subject to sections 208, 209 and 503(b) of Act) and 103 FCC 2d 600, 604-05 (complainant need not sustain damages as result of alleged wrongdoing to file section 208 complaint).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal No. 1493

Tariff F.C.C. No. 16

ORDER

Adopted: February 3, 1989; Released: February 6, 1989

By the Chief, Common Carrier Bureau:

1. On January 24, 1989, AT&T Communications (AT&T) filed the above-referenced transmittal, proposing rates, terms, and conditions for Federal Telecommunications System 2000 (FTS 2000). With its filing, AT&T submitted two versions of the tariff pages containing the revisions, with the prices deleted from one version (Redacted Version). AT&T also filed an application for special permission, requesting waiver of Sections 61.2, 61.54(j), and 61.72 of the Commission's Rules, 47 C.F.R. §§ 61.2, 61.54(j), 61.72, to the extent that they require AT&T to file on the public record and otherwise publish the FTS 2000 rates.[1] AT&T proposes to file only the Redacted Version on the public record. On February 3, 1989, the Commission released a Public Notice requesting comments on AT&T's waiver request.[2] The comments are due no later than February 10, 1989.

2. Under the Commission's Rules, petitions against Transmittal 1493 are due to be filed on February 8, 1989. *See* Section 1.773(a)(2)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2)(ii). In light of the Commission's request for comments on AT&T's waiver request, the Bureau has determined that good cause exists for deferral of the date for filing petitions against Transmittal 1493.

3. Accordingly, IT IS ORDERED, that the date for filing petitions against AT&T Transmittal No. 1493 IS DEFERRED until further notice.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Letter from W.E. Lind, Administrator Rates and Tariffs, AT&T, to Secretary, Federal Communications Commission, Application No. 511, Jan. 24, 1989.

[2] Public Notice, DA 89-137, released Feb. 3, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications Equipment
and Services by the Hearing Impaired
and Other Disabled Persons

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: February 13, 1989; Released: Februray 16, 1989

By the Commission:

1. On August 17, 1988, the President signed into law the Hearing Aid Compatibility Act of 1988, Public Law 100-394 (HAC Act).[1] The HAC Act requires all "essential" telephones[2] and nearly all telephones manufactured in or imported into this country more than one year after its enactment to be hearing aid compatible (HAC). The new law directs the Commission to "complete Rule Making actions required to implement the amendments made by the Hearing Aid Compatibility Act of 1988 within nine months after the date of enactment of such Act." HAC Act § 710(f). This Further Notice of Proposed Rule Making responds to that directive.

BACKGROUND

2. In response to the Disabled Act, note 1, *supra*, the Commission, on December 1, 1983, adopted rules designed to improve the availability of telecommunications equipment and services for the hearing impaired and other disabled persons.[3] These rules: (1) require telephones classified as "essential" to be internally compatible with hearing aids specially designed for telephone use;[4] (2) describe the technical standards hearing aid compatible telephones must meet; (3) require each telephone package to denote whether the telephone is hearing aid compatible; and (4) allow carriers to provide "specialized terminal equipment" to persons with hearing, sight, speech or mobility impairments, and permit state commissions to allow carriers to recover through tariffs "reasonable and prudent costs not charged directly to users of such equipment." During the 1982 Congressional hearings leading to the Disabled Act and in Commission proceedings,[5] it was evident that a segment of the U.S. population was having difficulty obtaining telecommunications services and equipment because of certain physical disabilities they had. This Commission believed the rules adopted would improve access to telecommunications services by these disabled persons. Subsequently, a number of parties presented arguments to the Commission suggesting that these rules were not adequate to accomplish their intended purpose. In response, the Commission initiated this docket to examine the effectiveness of the current rules, particularly in the wake of recent technological and other changes. On March 29, 1988, we issued a Notice of Proposed Rule Making and Further Notice of Inquiry (*Notice*), CC Docket No. 87-124, 3 FCC Rcd 1982 (1988), proposing, among other things, specific rule changes that, if adopted, could increase the ability of the hearing impaired to access telephone services. We proposed to expand the definition of essential telephones to include all credit card-operated telephones and workplace telephones located in common areas likely to be used by hearing impaired employees. In the *Notice* we noted that Section 710(b) of the Disabled Act prohibited the Commission from requiring all telephones to be hearing aid compatible.[6] The Disabled Act also directed the Commission, in implementing the Act through regulations, to consider the costs and benefits to "all telephone users, including persons with and without hearing impairments" and to adopt rules that "encourage the use of currently available technology and do not discourage . . . the development of improved technology." 47 U.S.C. § 710(e).

3. Comments filed in response to the *Notice* by organizations representing segments of the hearing impaired community complain that our proposed rules would still deny them access to many telephones. They maintain that in the work environment, hearing impaired persons would not have the same access to all telephones in the workplace as hearing employees, and that hotels and motels are not required to equip more than 10% of their rooms with HAC telephones. The HAC Act addresses these concerns. Congress concluded that its action in 1982 did not completely address the needs of the hearing impaired. The Senate Report stated:

> By imposing the HAC requirement on only essential telephones, the 1982 Act does not go as far as possible to advance the rights of hearing aid users to communicate by telephone. No matter how broadly the FCC defines "essential", it is impossible to specify in advance all the telephones that a hearing aid user might need. Travelling salespeople, repairmen and women, doctors, and others who make house calls or work outside of an office, for instance, often use telephones that would not be classified as "essential". The lack of access to HAC telephones in these situations can limit a hearing aid user's ability to function in certain jobs. Similarly, it is impossible to predict beforehand when an emergency situation may arise. . . . Emergencies may occur, for instance, at a friend's home or in another person's business or office. In short, the situations in which a hearing aid user would need access to a telephone are innumerable.

Senate Report No. 100-391, 100th Congress, 2d Sess., at 3 (1988) (Senate Report). To alleviate its concerns for the hearing impaired, Congress enacted the HAC Act. With some limited exceptions, this law requires telephones manufactured in or imported into this country after August 16, 1989, to be HAC.

4. We conclude that the HAC Act removes the need for the Commission to expand the definition of "essential" telephones as was proposed in the *Notice*.[7] The HAC Act requires *all* telephones manufactured in or imported into this country after August 16, 1989, to be hearing aid compatible.[8] However, the new law expressly does not

apply to refurbished, repaired or resold telephones, and does not cover, at least initially, the currently exempt telephones used in public mobile[9] and private radio[10] services or "secure" telephones used for classified communications.[11] The new law requires the Commission periodically to review the exemptions for public mobile and private radio services. To revoke these exemptions, the HAC Act requires the Commission to determine that (1) revocation is in the public interest; (2) continuation of the exemption without such revocation or limitation would have an adverse affect on the hearing impaired; (3) compliance is technologically feasible for the telephones to which the exemption applies; and (4) compliance with the mandatory HAC compatibility requirement would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed. In addition, the HAC Act permits exemption of cordless telephones from the hearing aid compatibility requirement until August 16, 1991.

5. Consistent with the HAC Act we initiate a further notice of proposed Rule Making to amend Section 68.4 to require all essential telephones and all new telephones manufacturered in or imported into this country after August 16, 1989, to be HAC, with the exception of telephones used in public mobile and private radio services, as well as for secure telephones. *See* Appendix B, proposed Section 68.4(a)(1). In addition, we propose that cordless telephones have a grace period of three years after the enactment of the HAC Act before they must comply with the HAC requirement. We also propose that the amended rules include the exemptions for telephones used with public mobile and private radio services, which we shall periodically review, as required by the Act. The HAC Act does not require any retrofitting of units manufactured or imported prior to August 17, 1989, but permits the sale of those telephones until their stock is depleted.[12] We seek comments on the proposed revision to Section 68.4 as outlined in Appendix B, and invite other proposed changes interested parties believe appropriate to comply with the HAC Act.

6. In an attempt not to impede technological advances in telephone design, the HAC Act authorized the Commission to grant waivers of the hearing aid compatibility requirement where manufacturers can demonstrate it is either too costly and/or is infeasible to comply. "This provision applies to 'new' telephones, *i.e.*, those that employ a technology that has not previously been marketed, and telephones associated with a new technology or service." Senate Report at 7. Under this waiver scheme, Congress required the Commission to determine, on the basis of evidence in the record, that such new telephones, or technology or service, are in the public interest and that (a) compliance with the HAC requirements is infeasible, or (b) compliance with those requirements would increase the costs of the telephones, or of the technology or service, to such an extent that the telephones, technology or service could not be successfully marketed.[13] The Commission is further required to consider the effect on hearing-impaired individuals of granting the waiver, and to review periodically the need for any waiver granted. Our proposed Section 68.5 tracks this waiver scheme. *See also* Section 710(b)(3) of the HAC Act and Senate Report at 6-7. We solicit comment with respect to the waiver provision of proposed Section 68.5. We note that Section 710(b)(3) of the HAC Act does not contemplate Commission waiver of the HAC requirements with respect to "essential" telephones:

> This section [710(b)(3)] does not permit the FCC to waive the requirement in subsection (b)(1)(A) that all 'essential' telephones be compatible. Thus, the bill alters none of the requirements of the 1982 Act or the FCC's rules implementing that Act.

Senate Report at 11. We request interested parties to comment on proposed Section 68.5 and to specify any additional criteria appropriate for considering such waiver requests.

7. This action is necessary to fulfill the instructions of Congress described in the HAC Act. Accordingly, pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended, IT IS ORDERED that a Further Notice of Proposed Rule Making IS INSTITUTED.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

8. In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 the Commission issues the following initial regulatory flexibility analysis:

A. Action Contemplated and Reason for Action.

9. By this Further Notice of Proposed Rule Making, the Commission seeks to elicit comment on a proposal to change its rules to provide the hearing impaired with greater access to telecommunications services.

B. Objective.

10. The objective of this Rule Making is to fulfill the requirements of Congress and the Hearing Aid Compatibility Act of 1988, Public Law 100-394.

C. Legal Basis.

11. The legal authority for this action is contained in Sections 1 and 4(i) of the Communications Act, 47 U.S.C. §§ 151 and 154(i), and the Hearing Aid Compatibility Act of 1988, Public Law 100-394.

D. Description, Potential Impact and Number of Small Entities Affected.

12. The effect of the proposed rules will depend upon whether businesses and manufacturers currently are using or manufacturing hearing aid compatible telephones. The overall economic impact of the proposed rules should be small. Evidence from the legislative history indicates that cost per telephone for hearing aid compatibility range from 0.20 to 0.50, or between12 and14 million per year. Congress found that the new law will be easier to enforce than the law and rules stemming from the Disabled Act of 1982. The focus of the old legislation was on the location of the telephone, not on its type. The burden of complying with the current rules thus rests with the person installing the telephone, but installers are not necessarily informed of the HAC requirements, nor are most hearing aid users. Therefore, Congress notes, neither installers nor hearing aid users know whether a telephone they attempt to use or install should be or is HAC. By

imposing the responsibility for HAC compliance on manufacturers, which are well informed through their trade associations. Congress decided that the enforcement burden of HAC rules would be ameliorated. Senate Report at 3-4.

E. Recording, Recordkeeping, and Other Compliance Requirements.

13. No additional burdens anticipated.

F. Federal Rules that Overlap, Duplicate or Conflict with these Proposed Rules.

14. None.

G. Any Significant Alternatives to Minimize the Impact on Small Entities.

15. None.

16. Written comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

PAPERWORK REDUCTION ACT

17. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information collection and/or record keeping, labelling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

ADMINISTRATIVE MATTERS

18. In accordance with the applicable procedures described in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested parties may file comments on or before March 9, 1989, and reply comments on or before March 20, 1989. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and provided that the Commission's reliance on such information is noted in the Report and Order.

19. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments provided that the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

20. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. Section 1.1202(b). Any person who submits a written *exparte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes that data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. Section 1.1206.

21. Accordingly, pursuant to the authority contained in Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 and 154(i), and the Hearing Aid Compatibility Act of 1988, Public Law 100-394, IT IS PROPOSED that the amendments to Part 68 of the Commission's rules contained in Appendix B be adopted.

22. The Secretary shall cause a copy of this Further Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Further Notice of Proposed Rule Making to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

P.L. 100-394, August 16, 1988

H.R.2213
One Hundredth Congress of the United States
of America
AT THE SECOND SESSION

An Act
To require certain telephones to be hearing aid compatible.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act may be cited as the "Hearing Aid Compatibility Act of 1988".

Findings

Sec. 2. The Congress Finds that--

(1) to the fullest extent made possible by technology and medical science, hearing-impaired persons should have equal access to the national telecommunications network;

(2) present technology provides effective coupling of telephones to hearing aids used by some severely hearing-impaired persons for communicating by voice telephone;

(3) anticipated improvements in both telephone and hearing aid technologies promise greater access in the future; and

(4) universal telephone service for hearing-impaired persons will lead to greater employment opportunities and increased productivity.

Hearing Aid Compatibility Requirements

(b)(1) Except as provided in paragraphs (2) and (3), the Commission shall require that --

(A) all essential telephones, and

(B) all telephones manufactured in the United States (other than for export) more than one year after the date of the enactment of the Hearing Aid Compatibility Act of 1988 or imported for use in the United States more than one year after such date,

provide internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility.

(2)(A) The initial regulations prescribed by the Commission under paragraph (1) of this subsection after the date of enactment of the Hearing Aid Compatibility Act of 1988 shall exempt from the requirements established pursuant to paragraph (1)(B) of this subsection only --

(i) telephones used with public mobile services;

(ii) telephones used with private radio services;

(iii) cordless telephones; and

(iv) secure telephones.

(B) The exemption provided by such regulations for cordless telephones shall not apply with respect to cordless telephones manufactured or imported more than three years after the date of enactment of the Hearing Aid Compatibility Act of 1988.

(C) The Commission shall periodically assess the appropriateness of continuing in effect the exemptions provided by such regulations for telephones used with public mobile services and telephones used with private radio services. The Commission shall revoke or otherwise limit any such exemption if the Commission determines that--

(i) such revocation or limitation is in the public interest;

(ii) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals;

(iii) compliance with the requirements of paragraph (1)(B) is technologically feasible for the telephones to which the exemption applies; and

(iv) compliance with the requirements of paragraph (1)(B) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

(3) The Commission may, upon the application of any interested person, initiate a proceeding to waive the requirements of paragraph (1)(B) of this subsection with respect to new telephones, or telephones associated with a new technology or service. The Commission shall not grant such a waiver unless the Commission determines, on the basis of evidence in the record of such proceeding, that such telephones, or such technology or service, are in the public interests, and that (A) compliance with the requirements of paragraph (1)(B) is technologically infeasible, or (B) compliance with such requirements would increase the costs of the telephones, or of the technology or service, to such an extent that such telephones, technology, or service could not be successfully marketed. In any proceeding under this paragraph to grant a waiver from the requirements of paragraph (1)(B), the Commission shall consider the effect on hearing-impaired individuals of granting the waiver. The Commission shall periodically review and determine the continuing need for any waiver granted pursuant to this paragraph.

(4) For purposes of this subsection --

(A) the term "essential telephones" means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids;

(B) the term "public mobile services" means air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, and other common carrier radio communication services covered by Part 22 of Title 47 of the Code of Federal Regulations;

(C) the term "private radio services" means private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services; and

(D) the term "secure telephones" means telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

(f) The Commission shall complete Rule Making actions required to implement the amendments made by the Hearing Aid Compatibility Act of 1988 within 9 months after the date of enactment of such Act. Thereafter, the Commission shall periodically review the regulations established pursuant to this section.

APPENDIX B

It is proposed to amend Part 68 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 68) as follows:

1. Section 68.3 is proposed to be amended to add the following definitions:

§ 68. 3. Definitions.

Essential Telephones: Means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids.

Public Mobile Services: Means air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, and other common carrier radio communication services covered by Part 22 of Title 47 of the Code of Federal Regulations.

Private Radio Services: Means private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services.

Secure Telephones: Means telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

2. Section 68.4 is proposed to be revised to read as follows:

§ 68. 4 Hearing aid - compatible telephones.

(a)(1) Except for telephones used with public mobile services, private radio services and cordless and secure telephones, every telephone manufactured in the United States (other than for export) or imported for use in the United States after August 16, 1989, must be hearing aid compatible. Every cordless telephone manufactured in the United States (other than for export) or imported into the United States after August 16, 1991, must be hearing aid compatible.

(2) Every telephone listed in § 68.112 shall be hearing aid-compatible.

(3) A telephone is hearing aid-compatible if it meets the criteria contained in § 68.316.

(4) The Commission shall revoke or otherwise limit the exemptions of subsection (a)(1) of this section for public mobile services or private radio services if it determines that (a) such revocation or limitation is in the public interest; (b) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals; (c) compliance with the requirements of Section 68.4(a)(1) is technologically feasible for the telephones to which the exemption applies; and (d) compliance with the requirements of Section 68.4(a)(1) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.

3. Section 68.5 is proposed to be added to Part 68 to read as follows:

§ 68. 5 Waivers.

The Commission may, upon the application of any interested person, initiate a proceeding to waive the requirements of Section 68.4(a)(1) with respect to new telephones, or telephones associated with a new technology or service. The Commission shall not grant such a waiver unless it determines, on the basis of evidence in the record of such proceeding, that such telephones, or such technology or service, are in the public interest, and that (A) compliance with the requirements of Section 68.4(a)(1) is technologically infeasible, or (B) compliance with such requirements would increase the costs of the telephones, or of the technology or service, to such an extent that such telephones, technology, or service could not be successfully marketed. In any proceeding under this section to grant a waiver from the requirements of Section 68.4(a)(1), the Commission shall consider the effect on hearing-impaired individuals of granting the waiver. The Commission shall periodically review and determine the continuing need for any waiver granted pursuant to this section.

FOOTNOTES

[1] *See* Appendix A for relevant text. This law modifies the Telecommunications for the Disabled Act of 1982, Public Law 97-410, codified as 47 U.S.C. § 710 (Disabled Act).

[2] "Essential Telephones" include only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using hearing aids specially designed for telephone use. 47 U.S.C. § 710(b).

[3] Access to Telecommunications Equipment by the Hearing Impaired and Other Disabled Persons, Order, CC Docket No. 83-427, 49 Fed. Reg. 1352 (January 11, 1984), *modified*, 49 Fed. Reg. 19666 (May 9, 1984), *further modified*, FCC 84-382 (released August 13, 1984) (Hearing Impaired proceeding); 47 C.F.R. Part 64, subpart F, Sections 68.4, 68.112, 68.224 and 68.316.

[4] Most external hearing aids have a built-in telephone pick-up, or "telecoil," which is activated by a switch on the hearing aid. When this switch is placed in the "telephone" position, the microphone is turned off and the hearing aid can be used at full volume without feedback and with minimal background noise. These hearing aids are activated by the magnetic field generated

by telephone handsets. In-the-ear hearing aids generally rely on audio amplification rather than electromagnetic coupling (and a telecoil) to provide the wearer with telephone access. Unless otherwise indicated, references to hearing aid compatible telephones refer to equipment which is compatible with a telecoil type hearing aid. *See* House Report No. 97-888, 97th Cong., 2d Sess., at 8 (House Report).

[5] *See* Telecommunications Services for the Deaf and Hearing Impaired, Notice of Inquiry, CC Docket No. 78-50, 667 FCC 2d 1602 (1978), *terminated*, FCC 83-177 (released May 3, 1983); *Hearing Impaired* proceeding.

[6] The House Report accompanying the Disabled Act states:

> The reported bill does not require all telephones to be compatible with hearing aids. Rather, the bill preserves consumer choice while ensuring that the needs of the hearing impaired are fully served. The legislation focuses on those "essential telephones" to which the hearing impaired must have access if they are to function effectively in modern society. Companies are free to manufacture and to market non-compatible telephones, and businesses and consumers may purchase these instruments for use by persons who do not have hearing impairments.

House Report at 9.

[7] As stated in footnote 2, the term "essential telephones" means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids. The current rules define telephones frequently needed by the hearing impaired in Section 68.112(c). These include any telephone on which calls may only be paid for by credit card or other pre-arranged credit, unless an HAC coin telephone is "nearby and readily available."

[8] Because we believe that the HAC Act essentially supersedes our proposal contained in the Notice of Proposed Rule Making portion of CC Docket No. 87-124 and due to the time constraint imposed on us by the HAC Act, we separate the Notice of Proposed Rule Making portion of CC Docket No. 87-124 from the Further Notice of Inquiry (FNOI). The FNOI portion of this proceeding, which addresses the creation of an interstate relay system for users of Telecommunications Devices for the Deaf, will be handled later. *See also* the Telecommunications Accessibility Enhancement Act of 1988, Public Law 100-542, Section 5.

[9] The term "public mobile services" as used in the HAC Act means air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, and other common carrier radio communications services covered by Part 22 of Title 47 of the Code of Federal Regulations.

[10] The term "private radio services" as used in the HAC Act means private land mobile radio services and other communications services characterized by the Commission in its rules as private radio services.

[11] The term "secure telephones" as used in the HAC Act means telephones that are approved by the United States Government for the transmission of classified or sensitive voice communications.

[12] Section 68.224 of the rules requires proper labelling of the telephone packaging. This requirement will continue to apply to all telephones, including those refurbished, repaired or resold in accordance with Section 68.224.

[13] "New" telephones are those that employ a new technology within the telephone. Senate Report at 11. "Infeasible" means impossible or "undoable." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-15

In the Matter of

Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations By Random Selection (Lottery)

NOTICE OF PROPOSED RULE MAKING

Adopted: Januaury 30, 1989; Released: March 10, 1989

By the Commission: Commissioners Quello and Dennis issuing separate statements.

INTRODUCTION

1. The Commission is initiating this proceeding to explore the possibility of improving the system used to award licenses for new broadcast facilities. More specifically, we are proposing for consideration the use of a random selection or lottery procedure[1] for new AM, FM, and television broadcast stations[2] instead of the present comparative hearing process. [3]

2. After more than 20 years of experience in using the existing comparative hearing procedures to select among mutually exclusive applicants for new broadcast stations, it appears that this selection process may frequently operate to delay service to the public significantly without providing substantial offsetting benefits in terms of selecting a "better" applicant. In addition, the process continually drains the Commission's limited administrative resources, as well as the resources of potential licensees. Moreover, the process is expensive for applicants, often resulting in the expenditure of considerable litigation and/or settlement costs. Further, the intended beneficiary of this process, the public, may never obtain the fruits of our ultimate selection because the permittee decides, or is forced by unforeseen circumstances, to modify its proposed operation, the nature of its ownership, or proposed involvement in management or is compelled to assign the permit, without profit, to a third party. Finally, even when there is no change in the proposed operation of the station or subsequent assignment of the permit, it is highly questionable whether our elaborate and costly comparative process actually results in a material benefit to the public. This is especially true in those cases where the comparative distinction between a winning and losing applicant, both of whom are basically qualified, is marginal.

3. In view of these difficulties with the current system, we are inviting comment on whether use of the random selection procedures (lotteries) prescribed by Section 309(i) of the Act would, on balance, better serve the public interest without any diminution in the quality of service provided to the public (or, at most, without any significant diminution in such service quality). We have already exercised our statutory authority to use random selection procedures in many of those radio services for which there have been backlogs of applications and, from a legal standpoint, it is our tentative conclusion, based upon the statutory language of Section 309(i) itself, that we have the authority to use these procedures to award licenses in other broadcast services.

4. Before we discuss our proposal further, however, we shall first review the existing comparative procedures. An understanding of the existing process, its complexities and overall difficulties is extremely important for a full appreciation of the reasons for our undertaking this reappraisal.

DISCUSSION

5. *The Comparative Hearing Process.* When presented with two or more mutually exclusive applications[4] for a broadcast license, the Commission has traditionally awarded the license to the applicant who has demonstrated in a comparative hearing[5] that it is the better or best qualified to serve the public. Essentially, this means choosing, from two or more basically qualified applicants, one applicant who has the better or best comparative qualifications. The adjudicatory framework used to make this comparative selection can be described most charitably as laborious, exceedingly time consuming, expensive and often results in choices based on, at most, marginal differences. To understand these adverse consequences fully, it is necessary to examine the process in some detail.

6. Use of the comparative adjudicatory process involves, *inter alia*, the following. Within 20 days of the mailing of the hearing designation order, parties must file a written Notice of Appearance with the Commission. Within 30 days after publication of the designation order in the Federal Register, parties may file motions to enlarge, change or delete issues. Motions to enlarge issues, in particular, are heavily used by comparative hearing applicants.[6] Oppositions to the motion can be filed within 10 days thereafter and replies to the oppositions can be filed within 5 days after the opposition is filed.[7] Typically, motions to enlarge issues are used by applicants to raise potentially disqualifying issues against competing applicants. On balance, a significant number of such issues are not added to the proceeding. However, these determinations cannot be made until the time for filing oppositions and replies has expired. Furthermore, after the 30 day period for filing motions to enlarge has passed, parties may at any future stage of the adjudicatory process file additional such motions, provided they are filed within 15 days after new facts or newly discovered facts are ascertained. Again, oppositions may be filed within 10 days and replies within 5 days. Such later filed motions can be particularly disruptive of the process when they occur subsequent to the initial hearing. For example, where a motion is granted while a case is on appeal to the Review Board or the Commission, at least a partial remand of the case to the Presiding Administrative Law Judge (ALJ) would be required. Even when the issues are not added, the ALJ, the Review Board or the Commission must, to some extent, divert their resources from the case in chief to consider all the pleadings pertaining to the motion to enlarge and make a decision.

7. Within 30 days after the designation order becomes effective, the presiding ALJ conducts an initial pre-hearing conference. At that time parties are asked to indicate their intended use of discovery procedures. The Rules require the ALJ to allow a reasonable period of time prior to commencement of the hearing for discovery. The parties may elect to pursue depositions upon oral examination or upon written interrogatories or may decide to serve written interrogatories upon any other party. Most parties elect to proceed by depositions upon oral examination. A minimum of 21 days notice in writing must be given to the witness whose deposition upon oral examination is sought. Within 7 days after service of the notice to take oral deposition, any party may file an opposition. Seven days thereafter, any party may file a response to the opposition. If an opposition is filed, the depositions cannot be taken until such time as the ALJ rules on the motion. A minimum of 35 days notice in writing must be given to the witness whose deposition upon written interrogatories is sought. Moreover, within 7 days after the filing and service of the original deposition interrogatories, any other party may file additional written interrogatories directed to the same witness. Further, within 14 days after filing and service of the original deposition interrogatories, any party may file cross interrogatories limited to matters raised in the original and/or additional interrogatories. Within 21 days after service of the original interrogatories, any party may move to limit or suppress any original, additional or cross interrogatory, and the person to be examined may file a motion opposing the taking of depositions. Within 28 days after service of the original interrogatories, a response to a motion to limit or suppress any interrogatory or to a motion opposing the taking of depositions may be filed by any party to the proceeding. As an alternative or in conjunction with depositions, parties may elect to serve written interrogatories on any other party. Such interrogatories must be responded to by answers and/or objections within 14 days after service of the interrogatories or within such shorter or longer period as the ALJ may allow. Within 7 days after the interrogatories are responded to, any party may move for an order with respect to any objection or other failure to answer an interrogatory. Thereafter, the party upon whom the interrogatories were served has 7 days to file a response. As a final discovery matter, upon motion of any party showing good cause therefor, the ALJ may order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, etc., that are not privileged and constitute or contain evidence relating to any of the matters within the scope of permitted discovery examination. The above intricate and complex discovery procedures are used frequently by the parties in comparative hearing cases and, in a material way, necessarily contribute to the cost and length of the overall process.

8. After discovery is completed, the parties exchange their hearing exhibits and thereafter provide notification of witnesses desired for cross-examination. At a later time, a hearing is held, usually in Washington, D.C., where witnesses are examined by counsel before the ALJ and documentary and oral evidence is introduced into the record. The time required to complete the hearing depends on the number and complexity of the issues involved. In addition to the legal expense of the hearing and the prehearing matters noted in paragraphs 6-7, *supra*, principals of the parties also incur the expense of traveling to Washington and attending the hearing.

9. After the record is closed, the parties file proposed findings of fact and conclusions of law. The findings reflect the parties' detailed analyses of the record evidence and a recommended resolution based upon their research of legal precedent. The time for filing findings varies. Typically, at least 30 to 60 days after the record is closed is provided. In complex cases, 90 days or more may be provided. In addition, at least 14 to 20 days is provided for the filing of reply findings of fact and conclusions of law. Subsequently, the ALJ issues his Initial Decision selecting a comparative winner. Most Initial Decisions involving non-complex cases are rendered within six months after reply findings have been filed. Complex cases can take considerably longer.

10. Within 30 days after the full text of the Initial Decision has been released, any party may file exceptions to the Review Board and request oral argument. Within 10 days thereafter, parties may file reply exceptions. The Review Board generally issues its appeal order within six months after release of the Initial Decision.

11. Within 30 days after the Review Board's order is released, any party may file an Application for Review with the Commission. Oppositions may be filed within 15 days of the filing of an application and replies within 10 days after the filing of any opposition. Within nine months thereafter, the Commission usually renders its order disposing of the case.[8]

12. Appeals of final Commission orders can be taken to the U.S. Court of Appeals. Ultimately, such appeals may be taken to the U.S. Supreme Court, although resort to that court is rarely sought.

13. While we recognize that the comparative hearing procedures are designed to ensure that all parties are afforded maximum due process consistent with the requirements of the Administrative Procedure Act, the overriding questions are whether this process is superior or inferior to a lottery selection method, after analyzing the respective costs and benefits of both procedures, and, therefore, which process operates better to serve the public interest. If we were confident that the current process permitted us to make choices resulting in discernibly better service to the public, the fact that the process is cumbersome would be outweighed by the benefits it conveyed. In practice, however, the process does not appear to convey these intended benefits. *See* paragraphs 17 and 23-29, *infra*.

14. Cases employing all of the steps noted in paragraphs 6-12, *supra*, take from 3 to 5 years or more to complete, *after* the case has first been designated for hearing. By way of illustration, the case of *Alexander S. Klein*, 86 FCC 2d 423 (1981), for a new FM broadcast station took approximately six years to resolve from the time it was designated for hearing in 1975 until its completion in 1981.[9] The case involved three mutually exclusive applicants who employed discovery procedures and filed numerous interlocutory petitions, motions, exceptions and appeals. The ALJ's Initial Decision was remanded by the Review Board on appeal. On appeal of the ALJ's supplemental Initial Decision, the Review Board reversed and awarded the license to another party. On further appeal, the Commission affirmed the Review Board's ultimate determination, and an appeal was filed with the U.S. Court of Appeals. However, the parties entered into a settlement agreement

prior to a resolution of the last appeal. In addition to the length of time required to reach finality, the case obviously involved a significant cost and expenditure of Commission and applicant resources as well as a lengthy delay in new service being provided to the public.

15. While we are fully cognizant that many cases settle prior to issuance of an Initial Decision, the costs of such settlements can be high. For example, we examined the orders issued by ALJs during the period from January 1, 1988, to June 30, 1988, that resulted in approval of settlement agreements in comparative new licensing proceedings. Of the approximately 61 settlement orders issued, the average settlement cost[10] per case for FM stations was 79,872.70; for AM stations, 15,850; and, for TV stations, 64,805. In these types of settlement cases a selection from among qualified applicants could just as easily be made by a lottery procedure, possibly without the need for expensive settlement costs.[11] This is particularly true once it is recognized that the Commission does not use the comparative criteria to select permittees in settlement cases.[12]

16. As to those cases which settle subsequent to an Initial Decision, such as the *Klein* case, the same arguments noted in paragraph 15, *supra*, apply. For example, in one case for a new AM station, reimbursement of application and hearing-related costs to one applicant amounted to 347,576, of which 313,950 was for legal expenses.[13] However, an additional factor here is the actual expenditure of applicant and Commission litigation resources that results in a settlement rather than a comparative selection.

17. In addition to the factors noted above, it is essential to ascertain whether the existing process results in discernibly better service to the public than an alternative procedure. In this regard, the object of the existing elaborate process is to use the comparative qualification criteria to select the applicant that will best serve the public interest. Based on our years of experience in this area, we tentatively have concluded that, generally, the criteria do not lend themselves to consistent and easily predictable results and that the process often functions to produce only marginal benefits to the public.[14] We turn now to a discussion of the comparative criteria.

18. *The Comparative Criteria.* Prior to 1965, applicants were free to introduce evidence on *any* issue that would demonstrate that a particular applicant was the best qualified to operate on the frequency in question; but gradually, the Commission identified the factors which would be used to choose the best qualified applicant on a case-by-case basis. Those which subsequently evolved included integration of ownership and management, the nature of ownership (including character, previous broadcast experience, and participation in civic activities in the principal community of license), diversification of ownership, previous broadcast record, and finally, program and staffing proposals.[15] However, the adjudicative process provided little guidance as to what relative weights should be accorded to these indicia of comparative merit.

19. In order to clarify its policies regarding the comparative criteria and their use in broadcast licensing hearings, in 1965 the Commission issued the *Policy Statement on Comparative Broadcast Hearings (1965 Policy Statement).* [16] The *1965 Policy Statement* set forth two principal objectives toward which the process of comparison should be directed: first, a maximum diffusion of control of the media of mass communications and, second, the best practicable service to the public. The principal factor, diversification of control of the media of mass communications, was characterized by the Commission as a factor of "primary significance." Thus, applicants owning no interest in existing media concerns were given a preference over applicants with such interests. The second principal factor discussed by the Commission was integration of ownership in the day-to-day management of the broadcasting station. The *Policy Statement* identified integration as a factor of "substantial importance." Components of the integration factor which the Commission announced it would consider included an applicant's previous broadcast experience, local residence and past participation in civic affairs.

20. The *1965 Policy Statement* addressed several other comparative factors considered to be of decisional significance. One such consideration was proposed program service. The *Policy Statement* also outlined the Commission's proposed comparative evaluation of an applicant's past broadcast record.[17] Finally, the *1965 Policy Statement* noted that, where appropriate, comparative consideration also would be accorded to proposed efficiency of frequency use, character (where an issue had been specifically designated)[18] and any other "relevant and substantial factors" specifically so designated by the Commission.

21. Also of decisional significance in the context of comparative broadcast licensing procedures have been "Section 307(b) issues." Specifically, Section 307(b) of the Communications Act requires that the Commission allocate licenses in such a way as to promote a "fair, efficient, and equitable distribution of radio service. . . among the several States and communities."[19] In comparative proceedings, the Commission generally has required a comparison between the service needs of the proposed communities of license to be made prior to examining the comparative qualities of the applicants. Moreover, a preference under Section 307(b) has been dispositive of a comparative hearing because a community's need for service has been considered to be more important than a determination of which applicant is otherwise better qualified.[20] In other words, a sole applicant that is otherwise qualified and proposes to serve a community of license preferred under Section 307(b) will prevail in the hearing over all other applicants proposing service to other communities without any comparison being made.

22. In evaluating applications under Section 307(b), the Commission has considered two factors. First, a determination is made as to the number of local broadcast stations that exist in the communities involved. Second, the Commission considers the amount of stations that are already received over-the-air in the proposed service area. Section 307(b) cases, however, are not as common as they were in the past. This is due to the fact that the Commission has eliminated a rule under which applicants could file for an FM or television channel in any community located within ten or fifteen miles of the community to which the channel had been assigned on the Table of Allotments.[21] As a result, Section 307(b) issues occur primarily in mutually exclusive hearings for stations in the AM service band which, unlike FM and television, does not have a Table of Allotments.

23. *Use of Comparative Criteria.* As noted above, with the exception of a section 307(b) determination, diversification of control is the most significant criteria, followed by integration of ownership and management. Comparative analysis under integration, the most frequently used

criterion, is quite complex. Essentially, it involves a two-step approach. In the first step, the ALJ determines, on a quantitative basis, the extent to which the owners propose to work in management positions such as general manager, station manager, program director, or sales manager at the station. Second, the ALJ considers the extent to which this integration of ownership and management may be enhanced by four qualitative factors: (1) present or proposed local residence by integrated personnel in the community of license or the station's service area; (2) the degree to which minority and female owners will be integrated in station management;[22] (3) past participation in civic activities; and (4) past broadcast experience of the integrated principals.[23]

24. The Administrative Law Judge seeks to compare the applicants and award preferences based on these criteria that range from "overwhelming" to "substantial" to "moderate" to "slight" to "very slight." He then compares the preferences as between applicants to select an overall winner. As illustrated in the following case, the determination as to how much weight to assign particular preferences and whether one applicant's preferences are greater than another's has resulted in inconsistent results, thus making predictability of application of the criteria uncertain. Most importantly, the inherent nature of often insubstantial comparative factual differences between applicants has led to license awards based on minor distinctions that appear not to reflect substantial differences in the quality of service to be provided.

25. *Greater Wichita Telecasting, Inc.* An example of the different results that can be reached based on insubstantial comparative factual distinctions is *Greater Wichita Telecasting, Inc.*[24] This case involved the mutually exclusive applications of Greater Wichita Telecasting, Inc. (Greater Wichita) and Columbia-Kansas TV, Ltd. (Columbia) for authority to construct a new commercial television station at Wichita, Kansas. The Presiding Judge concluded that neither of the applicants had displayed "an overwhelming comparative superiority over the other."[25] Neither had merited any integration credit, and Greater Wichita received only a slight preference with respect to diversification of mass media because Greater Wichita's ownership interests in a television facility elsewhere were entitled to less weight for purposes of the diversification factor than the media interests held by Columbia's principals in Wichita, which included extensive cable interests.[26] This slight preference, however, was considered sufficient for concluding that Greater Wichita was the comparatively superior proposal.[27]

26. The Review Board evaluated the case and reached a different result.[28] It found that the respective media interests of both parties were "effectively cross-cancelling" and thus entitled neither to a "meaningful preference" for purposes of diversification.[29] In addition, it concluded that the ALJ had erred in categorically refusing any favorable consideration whatsoever "to Columbia's modest, but solid, proposal to inject at least *some* degree of equity owner participation into the management of station affairs."[30] According to the Board, "some credit -- however slight -- should have been given" the general partner's pledge to devote some time to station management."[31] In addition, it concluded that such credit should be enhanced proportionately by the general manager's past broadcast experience and participation in civic affairs. The Board acknowledged that such credit was "necessarily slight in absolute terms."[32] In addition, it awarded some credit to two of the limited partners because of their civic participation and vital positions they would have in the station's operations. Admitting that the distinctions between them required a "close and practical" application of the criteria and interpretations thereof, the Board concluded that Columbia had the "distinctive and ultimately dispositive advantage."[33]

27. In acting on an Application for Review, the Commission agreed with the Review Board's ultimate disposition of the case but disagreed with the weighing of the diversification and integration factors.[34] On the diversity issue, it concluded that Greater Wichita's majority ownership and control of two distant television permittees[35] was more significant than Columbia's limited media interests in Wichita and its distant CATV interests and thus, Columbia was entitled to a "slight" diversification preference.[36] The Commission, however, concluded that the Review Board had erred in giving any credit for owner participation to the limited partners because, based upon previous Commission precedent, limited parties are viewed as "passive investors" and thus, because they have no authority to control the licensee, their integration or lack thereof is inconsequential.[37] It declined to give integration credit for the general partner because his proposed commitment was "too vague."[38] Recognizing that this was a "relatively close case," the Commission concluded that Columbia was entitled to a "slight but, on the facts of this case, determinative preference on diversification" and should therefore be awarded the license.[39]

28. The *Greater Wichita* case typifies the problems inherent in the use of the existing comparative criteria.[40] The overall process is so complex because of the myriad of factors involved and the fine gradations of weight accorded to each of these factors that one level may reach one result, a second level a different result, and the third the same result as one of the other levels, but for substantially different reasons. The analyses may be based on minor distinctions having little, if any, impact on the quality of service to be provided. As a result, the process is viewed as lacking in overall consistency and predictability and as producing results that appear arbitrary in nature. On this last point, Commissioner Rivera, in describing the applicants in *Greater Wichita* as being "virtually in a dead heat," critically remarked how this decision "illustrates the artificiality of distinctions that can be drawn in comparative licensing cases."[41] Indeed, he labeled the determination on the diversification criterion as of "questionable distinction" and "one which finds little, if any, case law support."[42]

29. Given the problems of lack of predictability and marginal distinctions with little, if any, public interest effect that are inherent in an adjudicatory selection procedure as is reflected in paragraphs 25-28, *supra*, we seriously question whether a lottery procedure which makes a selection from among all qualified applicants might not better serve the public interest. This concern is amplified by our previous discussion on the inherent problems with the generic adjudicatory process (paragraphs 6-16, *supra*). However, another substantial reason for concern exists, specifically, the extent to which changed circumstances may vitiate the basis for a final comparative selection.

30. *Changed Circumstances.* Even though we have regulatory constraints to prevent abuse of the comparative licensing process, changed circumstances may occur that could obviate the reasons for having granted preferences to the winning applicant or for having conducted the

hearing altogether. For example, it is possible that an applicant who won in a comparative hearing on the basis of a comparative coverage preference would discover, after the hearing process is completed, that *legitimate* changed circumstances might prevent it from using a particular transmitter site and thereby providing the type of coverage -- in terms of areas and population -- that had enabled it to garner a decisionally significant preference on this issue. When this occurs, that permittee could file an application for a change in facilities and, upon Commission approval, could change its transmitter site, even though this difference in transmitter site may have affected the calculus of the preferences in the prior comparative hearing.

31. Likewise, it is possible that changed circumstances may prevent a significant shareholder of a permittee or licensee from participating full-time in a key management position such as General Manager or Station Manager even though that proposed integration had been the basis for a decisionally significant preference.[43] Equally significant, even though a comparative hearing had resulted in the selection of what appeared to be the best qualified applicant, legitimate changed circumstances may occur which could prevent that entity from ever providing service to the public and, instead, could result in the transfer of the permit to a third party that had no connection with the prior hearing. For example, after a lengthy and expensive hearing and appeal process, a permittee could -- within the first year after the grant -- assign the construction permit to a third party for its legitimate and prudent out of pocket expenses in prosecuting its application and in attempting to put the station on the air.[44] As a result, the station would be in the hands of a party that had nothing to do with the prior comparative hearing, thereby rendering the fine line comparison of the comparative hearing meaningless.[45]

Random Selection Process

32. In view of the magnitude of the problems and difficulties noted above, we tentatively conclude that it is especially appropriate for us to consider a different method of selecting licensees. On the basis of our initial review, we tentatively conclude that selection of new broadcast licensees using the random selection (or lottery) procedure authorized by Section 309(i) of the Communications Act would be substantially superior to comparative hearings.[46] First, the statutory lottery eliminates many comparative criteria, thereby simplifying the process.[47] Second, this simplified selection process is more objective and, therefore, easier to administer. Third, lotteries are inherently faster than comparative hearings. They therefore facilitate more rapid provision of service to the public. Fourth, the process is less costly to applicants. Consequently, it lowers entry barriers and encourages newcomers to the broadcast industry. Fifth, lotteries are less expensive for the Commission, as well. Sixth, use of a lottery should not reduce in any substantial fashion, if at all, the quality of licensees and their service to the public. We amplify these points more fully in the discussion that follows.

33. *Evaluation of Lottery*. As between the existing process and the alternative licensing scheme of random selection, the lottery would appear to be superior from the following perspectives:[48]

(a) *Simplification of Broadcast Licensing Process*. As we have demonstrated above, the existing adjudicatory procedures are quite time consuming and complex. *See* paragraphs 6 through 13, *supra*. In addition, from a substantive standpoint, the comparative hearing process is complex because decision makers must compare qualified applicants on numerous criteria. With respect to *each* of these criteria, there may be an almost infinite range of factual differences between the applicants which result in decision makers granting preferences that vary in weight from "overwhelming" to "substantial" to "moderate" to "slight" to "very slight". *See* paragraphs 18 through 28, *supra*.

By utilizing lotteries to license new broadcast stations, we could simplify this process significantly. Procedurally, there would be no need for the lengthy and complex adjudicatory and hearing procedures that are currently used. Instead, applications would be screened for completeness prior to the lottery, and, only after a tentative selectee had been determined, would there be an opportunity for parties to file petitions to deny against the winner. Moreover, generally such petitions would be limited to the basic qualifications of the tentative selectee. In addition, from a substantive standpoint, lotteries would simplify the licensing process because, instead of using the numerous comparative criteria currently in place and deciding cases based on a host of factual applicant differences, we would give significant preferences, as required by Section 309(i), only to applicants who would diversify mass media ownership and/or who are minority owners. We then would rely upon random selection to determine the tentative selectee. As a result, the overall licensing process would become easier to administer. *See also* (b), *infra*.

(b) *Objectivity and Ease of Administration*. As noted at paragraphs 23 through 28, *supra*, one of the major drawbacks with the existing system is the lack of consistency under that approach and the perception that decisions are based on inconsequential distinctions that have little or no relevance to the actual provision of efficient and effective broadcast service to the public. Because many of these proceedings lead to disparate results among or between different levels of agency decisionmaking -- Administrative Law Judge, Review Board, and Commission -- or even disparate results in cases that appear similar to earlier decided ones, the present system does not lend itself to certitude or predictability.

On the other hand, a lottery system would substantially reduce, if not eliminate, the need to resolve cases, that often have inconsequential factual differences, on a host of comparative issues. This would occur because preferences would be limited to those required by statute under Section 309(i)(3)(A), -- diversity of media ownership and minority ownership preferences -- which represents Congress' determination as to those factors that should govern in the selection among mutually exclusive applicants. Accordingly, we would create a more objective system that is easier to administer.

(c) *Speed.* Because the lottery system now contained in our rules obviates the need for comparative hearings and for petitions raising specific issues except as to the lottery winner, the lottery is a much faster means of processing license applications than the comparative hearing system.[49] Our use of the lottery in licensing for low power television, cellular radio, multiple multipoint distribution systems, specialized mobile radio systems, and for private operational fixed microwave service is persuasive evidence that the lottery dramatically accelerates the speed at which we can process license applications. The lottery, for example, has enabled the Commission to process over 23,000 mutually exclusive applications for low power television stations and translator stations and grant over 2500 permits since September, 1983.[50] This achievement would have been impossible under a comparative hearing system where an adjudication of just one group of mutually exclusive applications could have lasted for years before its conclusion. Similarly, a simplified lottery procedure better accelerates the licensing process. This is so because producing a single tentative selectee at the outset eliminates the need for any excessively detailed comparisons between the competing applicants. As a result of this increased speed, service to the public will be able to start more quickly, which benefits the public generally, not just applicants and the Commission.

(d) *Cost to the Applicants.* Without question, costs for the individual applicant would be much less than they are in comparative hearings. Because the lottery approach does not involve any hearings in its initial choice of the tentative selectee, the applicant avoids many of the often substantial fees for legal services, transportation costs, and assorted administrative expenses (*e.g.*, clerical help, copying, etc.). While there would still be costs to the tentative selectee in the event petitions to deny are filed and hearings are warranted, such costs are only borne by the one successful lottery applicant rather than all of the competing applicants. Moreover, even the winning applicant is better off financially because that applicant, like all the other applicants, would still avoid the costs associated with the complex and time consuming comparative proceedings involved in our present selection scheme. Further, the overall reduction in costs should lower barriers to entry and encourage newcomers to the broadcast industry.

(e) *Cost to the Agency.* We also believe that utilization of the lottery will place fewer administrative burdens on the Commission than the current comparative process. Because the lottery is a far more expeditious and efficient selection process than the present one, the Commission can use fewer personnel and other administrative resources to implement it. Furthermore, because we already have established a general lottery procedure for use by all the services authorized to use it, there should be minimal transitional costs in converting to lottery. Further, Commission personnel have already been allocated and trained to conduct lotteries in accordance with a detailed procedure. Although we recognize that some modifications of applications and forms would be necessitated if we converted to a lottery, we would anticipate those costs to be relatively minor, particularly when compared to the savings to the agency from eliminating the lengthy comparative hearings.

(f) *Quality of Service.* We have no reason to believe that our comparative criteria (and, indeed, any alternative comparative criteria) necessarily lead to "better" licensees and "better" service to the public in any meaningful sense. We thus have no reason to believe that the quality of licensees under a lottery system, and the service they provide to the public, will deteriorate. Indeed, our experience in dealing with licensees who are not selected on the basis of a comparative proceeding, *e.g.*, assignees, initial applicants who settle, low power television licensees selected by lottery, does not suggest any meaningful difference in the quality of licensees or their service to the public. We also note that use of a lottery system will further the public interest goals set forth by Congress in section 309 (i) – minority ownership and diversification of ownership of the mass media. Moreover, again based on our experience, we have no reason to believe that licensees selected after a lottery will be any less responsive to the needs and interests of their communities than those selected after a comparative hearing. We seek comment on these tentative conclusions.

34. In summary, we believe that the use of lotteries to select among mutually exclusive applicants would substantially speed-up the availability of these new services to the public at less cost to the applicant and the agency than the present comparative hearing process. In addition, the public would receive service from a fully qualified applicant. There is no reason to believe that such a fully qualified applicant would have any less of an incentive to provide the same level of efficient and effective service to the public than an applicant chosen through the comparative process.

35. *Legal Issues.* A threshold question presented by our proposal to award new broadcast authorizations by lottery is whether it is permissible under Section 309(i). We tentatively believe that it is.

36. Section 309(i)(4)(A) empowers the Commission to award licenses to qualified applicants using a system of random selection "in any instance in which the Commission, in its discretion, determines that such use is appropriate. . ." By its terms, therefore, the language of the statute is clear and imposes no limitations on our use of lotteries so long as in the exercise of reasoned discretion we conclude that their use in a given situation would be "appropriate in the public interest."[51] The Court of Appeals for the District of Columbia Circuit has recently confirmed this interpretation of the statute.[52] The Court emphasized that although the Conference Report accompanying Section 309(i) listed a number of factors for the Commission to consider in deciding whether to use lotteries, "these factors do not rise to the level of statutory requirements binding on the Commission."[53]

37. Although the factors set forth in the legislative history of Section 309(i) are not binding, we nevertheless have considered them in order to help inform our analysis of the suitability of using lotteries for initial licensing of full power broadcast facilities. In doing so, we have kept in mind Congress' admonition that, in making our "public interest finding" regarding services for which lot-

teries should be used, the Commission "should not apply the . . . factors mechanically or without regard to other salient considerations."[54] These factors include:

> whether there is a large number of licenses available in the particular service under consideration; whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; whether there is a significant backlog of applications; whether employing a lottery would significantly speed up the process of getting service to the public; and whether selection of the licensee will significantly improve the level [of] diversity of information available in the community versus the use of the traditional comparative hearing process.[55]

In the mass media area, we thus far have used lotteries only for low power television.[56] Low power television was particularly well suited for a lottery approach because it was a new service in which a large volume of mutually exclusive applications had been filed. Experience has shown lotteries to be helpful in expediting resolution of these many contested low power television applications. *See* note 50, *supra*.

38. Even though AM, FM and full-power television are established services, and, thus, the volume of pending mutually exclusive applications for them generally is somewhat smaller than for low power television, for the reasons already discussed, the use of a system of random selection to choose these initial licensees also is likely to expedite service to the public. In the *Conference Report*, Congress pointed out that the lottery process "is intended to alleviate many of the delays and burdensome costs faced by both applicants and the Commission in an initial comparative licensing proceeding with mutually exclusive applicants."[57] It is with that intent in mind that we examine whether the public interest would be better served by employing a lottery for AM, FM, and full power TV stations. A lottery approach may be especially beneficial for the licensing of new FM stations. In this regard, we recently allocated new FM channels to 689 new communities as a result of rule changes in BC Docket No. 80-90 to provide for a more efficient use of the FM band.[58] As a result, as of December 1, 1988, we had approximately 2,300 applications pending for new FM stations or for major changes in FM facilities, of which about 1,700 are mutually exclusive. This could require hearings for approximately 377 separate mutually exclusive FM groups that have, on average, 4.5 applications per group. Even greater numbers of new FM stations may be possible as a result of our recent proposal in MM Docket No. 88-375 to create another new class of FM channel: C-3.[59] If ultimately adopted, this would enable many Class A stations to upgrade their facilities to Class C-3 and, at the same time, would provide opportunities for allotting approximately 200 new Class C-3 FM stations.

39. We recognize that our proposal to utilize lottery procedures for FM licensing represents a departure from our prior position that we would refrain from altering the existing comparative procedures once we had made announcements of filing windows for a community.[60] However, we now believe that circumstances suggest that a different course of action may be needed to better serve the public interest. This is because, after several years of application processing, we are still faced with designating for hearing a significant backlog of applications for approximately 55% of the original Docket 80-90 allotments, as well as for numerous other post-Docket 80-90 allotments. Moreover, these pending applications then may have to run the entire gamut of the comparative hearing process, with its many delays and levels of review. Under these circumstances, we believe that it is appropriate to consider utilizing lotteries as the method of selecting permittees from among these applicants and, accordingly, seek comment on this aspect of our proposal. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

40. Although the number of stations available and the volume of mutually exclusive applications are not as great for AM and full service television as is the case in the FM service,[61] using lotteries in all these services could result in a fairer, more efficient, and less onerous system for those interested in applying for such licenses. In addition, as we have previously noted, authorization of new broadcast service by lottery would expedite service to the public considerably and would ameliorate many of the problems that are inherent in the existing comparative hearing process. Finally, use of statutory lotteries will promote diversity of opinion and viewpoint in these services because of the significant preferences afforded for minority ownership[62] and diversification.[63]

41. We note the statement in the *Conference Report* that the Commission "would have an extremely heavy burden to meet in attempting to justify use of a lottery for purposes of granting an individual license" for full-service broadcast stations.[64] The basis for this was the observation that, as of 1982, a "flood of new applicants . . . with all of the administrative problems attendant thereto, have not to date confronted the Commission." However, for the reasons discussed in paragraphs 31-33 and 37-39, *supra*, we tentatively believe that an adequate basis has been set forth to justify the use of lotteries in the referenced primary services.[65]

42. *Lottery procedures*. Because of our favorable experience with the lottery in low power television as well as in other services, we have proposed its use in the selection of licenses for other mass media services. As noted, although it is currently applied, among mass media services, only to low power television, a lottery procedure for all mass media exists in our rules.[66] Under that procedure, a lottery is used to determine the "tentative selectee" among mutually exclusive applications prescreened for acceptability. Preferences are given to applicants for minority ownership [67] and diversification of ownership and are incorporated into the lottery process by granting the applicant additional chances to be selected on the basis of his preference. In low power television, this scheme is implemented by assigning each applicant a set of consecutive numbers (a number block) from a series of numbers. To the extent a preference has been credited, it is reflected by an adjustment in the size of the number block assigned. A number from the numerical series is then randomly produced using a ping pong ball mechanism and the applicant whose number block contains the winning number is made the tentative selectee. After the determination of the tentative selectee, petitions to deny may be filed against that selectee.[68] If a substantial and material question of fact is raised by the petitions, the question is designated for hearing. Such hearing will normally be a paper hearing unless oral testimony is required, in which case a trial type hearing, conducted by

an ALJ, can be employed. This procedure has been effective in implementing the lottery in low power television and, therefore, we are disposed to use a similar lottery procedure for other mass media services. However, we welcome comment on the advisability of this approach and encourage alternative suggestions regarding the specific implementation of the lottery for these other services.

43. *Other Matters - Application Processing Changes to Implement Lottery.* While our experience has been that the lottery is an efficient and expedient means of license selection, we wish to consider refinements that might further improve upon the process.[69] For instance, lotteries tend to stimulate an increase in the number of applications. This in and of itself is desirable insofar as a large number of applications may indicate that, unlike the existing process, barriers to entry have been reduced. By the same token, however, unless due care is exercised, significantly reducing barriers to entry can also encourage sham filings because the costs associated with filing are relatively low.

44. Although we do not believe that the number of television and radio applications that would be filed if we were to use lotteries would approach the 100 to 200 applications per market filed originally in low power television, we nevertheless want to assure to the maximum extent feasible that our lottery procedures are designed to encourage only legitimate applicants to file. To accomplish this, we are considering establishing a fairly high acceptance standard for the applications. For example, in the low power television service, applications must be "complete and sufficient",[70] and in commercial FM, a "hard look" tenderability standard, along with an acceptance for filing standard, applies. Applications failing to meet these tests are returned as unacceptable for filing. By contrast, we subject applications for other mass media services to less stringent standards.

45. We also seek comment on whether we should impose stringent financial qualifications requirements on applicants. Currently, each applicant is required to certify that "net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue."[71] When such certifications are challenged, they are examined to determine whether an applicant has reasonable assurances of the availability of the funds relied upon.[72] However, given the likely possibility that the number of applications for new radio or television stations could increase after a lottery were instituted, we believe that it may serve the public interest to utilize a stricter standard -- that is, require applicants to submit, at the time they file their applications, documentation that they have a firm financial commitment from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier indicating that the lender is committed to lending a sum certain to the particular applicant. Likewise, if an applicant intends to rely on personal or internal resources, we invite comment on whether we should require applicants to submit audited financial statements, certified within one year of the date of the application, or balance sheets, current within 60 days of the date of the filing, showing the availability of sufficient net current assets to construct and operate the proposed station as we now require applicants in the rural cellular service to do. Furthermore, should balance sheets be accompanied by a certification of an officer of the applicant attesting to the validity of unaudited balance sheets? Finally, what rules or procedures, if any, should be adopted concerning financial commitments to an applicant for stations in various markets? In this regard, commenters are invited to consider the appropriateness of using rules similar to those set forth in Section 22.917(c) for the rural cellular service under which financial commitments may cover more than one application but, overall, the financial commitment must be sufficient to cover the costs of the various systems applied for.[73]

46. Alternatively, in lieu of a "firm financial commitment standard," commenters are also requested to consider the appropriateness of retaining the "reasonable assurance" standard and requiring applicants to submit documentation indicating that they have net liquid assets on hand or sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. Such documentation could include the type of information that was previously requested on Form 301, Section III, such as an itemization of the funds that will be necessary to apply for, construct, and operate the station (*e.g.*, estimated costs for transmitter and antenna equipment, buildings and land, engineering and legal services, and three months' operating costs) and the sources of funds that will be relied upon to meet these obligations. With respect to the latter, an applicant could be required to submit balance sheets, bank commitment letters, and documentation that any conditions of a bank or other loan (including security provisions and personal guarantees) can be met by applicants. Such information may be sufficient for ensuring that applicants are financially qualified yet may be easier to obtain than the documentation necessary to prove the existence of a firm financial commitment.

47. Problems involving multiple filings by a single party and real party in interest abuses could be resolved as they have been in low power television. There we require the applicant to certify that he has not entered into an agreement for the purposes of transferring any license awarded through the lottery. The applicant also must certify that he does not have an interest of one percent or more in any other mutually exclusive application and that no party to the application is an officer, director, or has an interest of one percent or more in any other application. Because that provision may not have always been effective in limiting these kinds of abuses, we might consider barring parties from having any interest in more than one application in a mutually exclusive group. This approach was utilized in the rural cellular service and is currently set forth in Section 22.921(b)(1), and commenters are asked to consider its applicability in the mass media area.[74] In addition, we seek comment on the extent to which the Commission's inconsistent and multiple application rules (Sections 73.3518 and 73.3520) are sufficient to address such abuses for full service stations.

48. We also require low power applicants to provide detailed ownership information so that we can identify the real party in interest. For instance, the corporate applicant must disclose its officers and directors and their ownership interests in the applicant. Similar information is required of a partnership applicant with regard to its general partners and any limited partners. In addition, applicants for low power television stations are required to certify that "no agreement, either explicit or implicit, has been entered into for the purposes of transferring or

assigning to another party, any station construction permit or license or interest therein that is awarded as a result of random selection or lottery."[75] Because these measures generally have proven successful in low power television, they should be appropriate for use in other mass media services. We welcome comment on these ideas and encourage other suggestions on how to maintain the integrity of the lottery process while not imposing undue barriers to *bona fide* applicants.

49. In addition, we seek comment on whether we should place any restrictions on settlement agreements, partial or otherwise, among mutually exclusive applicants as another step that may be taken to discourage the filing of applications by speculators who do not have a *bona fide* intention to own and operate a broadcast station but merely file in order to become part of a settlement group.[76] In the common carrier area, we have prohibited partial settlements among competing non-wireline applicants for rural cellular service authorizations because experience showed that permitting such arrangements increased litigation and delayed issuance of construction authorizations.[77] In a similar fashion, while we have no desire to raise entry barriers that might discourage filings from *bona fide* applicants, we invite comment on whether a similar prohibition here on the broadcast side would also serve the public interest from the standpoint of minimizing litigation and delay of service. We also request commenters to address what restrictions, if any, should be placed on settlements generally.

50. Finally, we invite comment on several other additional matters. First, we seek comment on what role, if any, Section 307(b) issues[78] should have if we adopt lotteries for licensing AM, FM, and TV stations. Our initial view is that no problem would arise regarding FM and TV licensing because Section 307(b) determinations are made in rule making proceedings to amend the FM and Television Tables of Allottment before applications are permitted to be filed for a given channel. However, in AM licensing, such Section 307(b) concerns are made at the applications stage because there is no table of allotments for AM broadcasting, which is licensed on a "demand for frequency" basis. Accordingly, we seek comment on the extent to which any such Section 307(b) issues for AM should be considered. Likewise, we ask commenters to consider the impact that adoption of lotteries would have on comparative coverage issues. Inasmuch as no preferences are permitted under Section 309(i) for differences in coverage proposals between applicants, commenters are invited to address whether such issues should be considered at all and, if so, how and when. As a third and related matter, we invite comment on whether we should revise our application procedures to require only the tentative winner of a lottery to obtain and submit its approval from the Federal Aviation Administration of the proposed transmitter site after the lottery has been held. We have previously encouraged all mutually exclusive applicants to submit such information as early as possible to ensure that their proposed site is available and suitable. By not requiring this information until after a tentative selective had been made, we could reduce paperwork burdens on applicants as well as eliminate needless processing of this information by our own staff. If we decide to go this route, however, we would expect the winning applicant to make otherwise acceptable site changes to accommodate FAA concerns. Fourth, we solicit comment on how and when requests for waiver of sections of the Commission's Rules -- such as for short-spacing or multiple ownership rules -- should be considered. One option would be to consider these requests prior to the lottery, which would have the effect of eliminating from the lottery proposals that could not be granted. Alternatively, we could await the results of the lottery and then consider such waiver requests only with respect to the tentative selectee as part of our determination of the tentative selectee's basic qualifications. Commenters are invited to consider the pros and cons of both options.

CONCLUSION

51. Our preliminary examination of the comparative process leads us to conclude tentatively that it has become unduly burdensome to applicants and to the Commission without providing a commensurate, meaningful assurance that it will more likely produce the best qualified licensees. The fine gradations in the comparative weight to be accorded differing factual proposals often result in final selections being based on minimal differences lacking any public interest significance. Further, the bulk of the applications designated for hearing (approximately 80%) are currently resolved on a basis other than a comparative decision by an ALJ. We therefore think it is timely to reappraise the existing system to see if a more meaningful and simplified selection process can be employed that will lead to the selection of fully qualified applicants. In this regard, it is our preliminary view that use of the statutory lottery for all broadcast services could result in faster, less costly, and an equally appropriate means of licensee selection, and, therefore, better serve the public interest. Accordingly, we invite commenters to address any or all of the issues raised by our proposal and submit all relevant suggestions with regard to the matters discussed herein.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for the Proceeding: The Commission initiates this proceeding to explore a possible alternative (use of random selection procedures) to the current system of selecting among mutually exclusive applicants for new broadcast licenses. The current system, involving numerous and complicated comparative hearings, has proven to be expensive and lengthy, and is often an unsatisfactory means of making adjudicatory determinations.

II. Objective of this Proceeding: This proceeding is intended to find a more efficient, less expensive method of awarding contested, new broadcast licenses.

III. Legal Basis: The legal basis for this action is contained in 47 U.S.C. 303, 309(i), and 154.

IV. Number and Type of Small Entities affected by the Proposed Rule: The entities affected will be new applicants. Small entities/entrepreneurs will benefit from a less expensive, simpler process.

V. Reporting, Recordkeeping and other Compliance Requirements Inherent in the Proposed Rule: The proceeding is looking at ways that might *relieve* the burden of time and expense invested by competing applicants in comparative hearings.

VI. Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule: None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action: The Commission is seeking comment on any possible methods of awarding new broadcast licenses by random selection which would offer the least hardship to competing applicants. We know of no alternative approaches that would minimize the impact on small entities.

PROCEDURAL MATTERS

52. Accordingly, the Commission adopts this *Notice of Proposed Rule Making* pursuant to the authority contained in Sections 4(i), 303(g) and (r), 309(i), and 403 of the Communications Act of 1934, as amended.

53. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before **May 9, 1989,** and reply comments on or before **June 23, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Policy Statement.

54. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget prescribed by the Act.

55. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

56. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

57. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, must provide, on the day of the oral presentation, a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

58. For further information regarding this proceeding, contact Roderick K. Porter (202) 632-6460, Stephen A. Bailey (202) 632-5414, or Andrew Rhodes, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. §309(i). Authority to utilize lotteries for initial licensing was conferred on the Commission by the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982).

[2] While our proposal herein to use a random selection or lottery procedure in lieu of the comparative hearing process is directed principally at mutually exclusive applications for new commercial broadcast stations, we seek comment as to whether it also would be appropriate to apply these procedures when mutually exclusive applications are filed for new noncommercial broadcast stations.

[3] The proposal to use a random selection or lottery procedure for AM, FM and television is similar to our intent to use alternative selection procedures in choosing among applicants for new FM translator stations. *See Notice of Inquiry on Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, MM Docket No. 88-140, 3 FCC Rcd 3664, 3670 (1988). Because we already address the possibility of using a random selection process with regard to FM translator stations in that proceeding, it is unnecessary to consider the same question in the instant Rule Making here.

[4] Two or more timely filed applications for the same frequency or for frequencies whose use would electronically interfere with each other are generally referred to as "mutually exclusive."

[5] *See* 47 U.S.C. §§307(a), 309(a), (e).

[6] There are 361 pages of case citations and brief descriptions of motions to enlarge, change or delete issues in the Pike and Fischer digest. Literally thousands of such motions are reported for the period 1964 to 1988.

[7] Although the Commission does not routinely grant requests for extensions of time to respond to motions to enlarge issues, such requests can and are granted where unusual or non-routine circumstances are established.

[8] It should be noted that the time required for the Commission to issue its orders after cases are ripe for decision is directly related to the number and complexity of pending cases and, most importantly, the availability of support staff to act on such cases. The same factors pertain to the ALJs and the Review Board. For example, there are 10 ALJs to act on 213 pending hearing cases (873 separate applicants), with no professional support staff. There are only 3 Review Board members to act on 14 pending appeal cases, with a support staff of 3 professionals. The Commission has 47 pending cases (166 separate applicants), with an adjudication support staff of 8 professionals. While it could be argued that this aspect of the process could be improved by hiring more staff, this is not a viable option given our budgetary limitations, nor is it otherwise a desirable option in view of the overall discussion herein. Similarly, the Commission does not have the flexibility to reassign its non-adjudicatory staff to this area without adversely affecting in a material way its numerous obligations in other areas. In addition, it must be remembered that all orders prepared by the staff must then be presented to the full Commission for its decision.

[9] Other examples of the length of time that elapses from the date mutually exclusive applications are designated for hearing until a final decision or settlement order is issued include: 4 years and 3 months (Docket Nos. 82-106-108); 3 years and 9 months (Docket Nos. 82-195-202); 4 years and 6 months (Docket Nos. 82-216-217); 4 years and 3 months (Docket Nos. 82-449-459); and 5 years (Docket Nos. 83-1332-1334).

[10] These figures do not take into account stock or other equity interests given in some cases as part of the settlement agreement. A listing of the cases involved in this study and the amount of settlement for each case will be included in this docket and hence made a part of the record in this proceeding.

[11] Although the possibility of settlements also would exist under a lottery approach, incentives other than those turning on the existing comparative criteria and applicant proposals might influence, and possibly constrain, the scope and/or frequency of such settlement arrangements. For example, a hearing applicant under the existing comparative standards might conclude prior to a trial of the issues that Commission precedent compels a grant to a competing applicant, notwithstanding the fact that the comparative proposal of the presumed winning applicant is deemed to be only *slightly* superior to its proposal. Thus, the first applicant may be amenable to a pre-trial settlement that will allow it to recoup its expenses to date in lieu of further litigation expenses that it concludes will lead ultimately to the denial of its application and the possibility of no reimbursement of its expenses. However, in a lottery procedure, this same applicant would know that there is no similar presumed certainty of a competing applicant receiving a grant. In addition, the applicant would know that it would have significantly less legal expenses in a lottery than a comparative hearing, whether it receives a grant or not. Therefore, it may be more willing to enter a lottery rather than pursue a settlement.

[12] Of the comparative hearing cases involving applications for new broadcast facilities, approximately 80% of such cases are terminated by settlement, voluntary dismissal or other reasons, none of which are based on a comparative selection among competing applicants. For example, we examined 39 mutually exclusive cases for new radio or television stations that had been designated for hearing in the first and third quarters of calendar year 1982. In so doing, we chose 24 comparative new hearing cases listed chronologically in the first quarter and the 15 cases listed chronologically in the third quarter from the Mass Media Bureau's hearing calendar. By subsequently examining the Commission's docket history cards for these cases, we were able to determine which of these cases settled. As a result of this research, we discovered that 33 (84%) of the cases involved were terminated on a basis which did not involve the comparative criteria. A listing of the docket numbers involved in this study is contained in the hearing calendar that will be placed in the docket of this proceeding and hence made a part of the official record in this proceeding.

[13] *See Gilbert Broadcasting Corporation*, 91 FCC 2d 450, 476-79 (1982).

[14] While these marginal benefits alone do not warrant retention of the present process, the case for change is accentuated when these marginal benefits are considered in light of the consequences noted in paragraphs 6-16, *supra*.

[15] For a discussion of the comparative criteria used prior to 1965, *see* R. Hyde, *FCC Policy and Procedures Relating to Hearings on Broadcast Applications in Which a New Applicant Seeks to Displace a Licensee Seeking Renewal*, 75 Duke Law Journal 253 (1975); and H. Gifford Irion, *FCC Criteria for Evaluating Competing Applicants* 43 Minn. L. Rev. 479 (1959).

[16] 1 FCC 2d 393 (1965).

[17] In practice, the comparative criteria for proposed program service and past broadcast record are almost never at issue in comparative hearing decisions.

[18] The Commission recently re-evaluated the significance to be accorded to an applicant's character in the context of broadcast licensing and concluded that where consideration of character did not result in disqualification, it would no longer be a relevant criterion in comparative proceedings. *See Report, Order and Policy Statement Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. denied*, 1 FCC Rec. 421 (1986).

[19] 47 U.S.C. §307(b) (1982).

[20] *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); and *WHW Enterprises v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985).

[21] *See Report and Order in the Matter of the Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy (BC Docket No. 82 - 320)*, 93 FCC 2d 436 (1983), *recon. denied*, 56 R.R. 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Company v. FCC*, 787 F.2d 645 (D.C. Cir. 1986). Section 307(b) issues for the FM and television services are now considered exclusively in Rule Making proceedings to amend the Table of Allotments.

[22] These qualitative enhancements were added by cases subsequent to the *1965 Policy Statement*. *See WPIX, Inc.*, 68 FCC 2d 381, 411-12 (1978) [minority enhancement]; *Mid - Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981) [female enhancement].

[23] Local residence and minority ownership are considered the most important qualitative enhancements. However, past broadcast experience may be elevated to the status of local residence and minority ownership if a daytime-only AM station applies for a new FM station in the same community of license and meets certain conditions including integration of ownership and management and a promise to divest the AM station within three years from the commencement date of program test authority for the new FM station. This is commonly referred to as the daytimer preference. *See Second Report and Order* in MM Docket No. 84-231, 101 FCC 2d 638 (1985), *recon. granted in part*, 59 RR 2d 1221, *aff'd sub nom. National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987).

[24] 96 FCC 2d 984 (1984).

[25] *Greater Wichita*, 90 FCC 2d 1056, 1075 (I.D. 1982).

[26] The ALJ declined, however, to assess a significant comparative demerit in this area of comparative evaluation. *Id.* at 1074.

[27] *Id.* at 1075.

[28] *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982).

[29] *Id.* at 1055.

[30] *Id.* at 1050.

[31] *Id.*

[32] *Id.* at 1051.

[33] *Id.* at 1054-55.

[34] *Greater Wichita*, 96 FCC 2d 984, 985-86 (1984).

[35] Several of Greater Wichita's principals had acquired ownership interests in another television station subsequent to the Review Board's decision.

[36] *Id.* at 993.

[37] *Id.* at 989.

[38] *Id.* at 990.

[39] *Id.* at 993.

[40] For other examples of such cases, *see Alexander S. Klein, supra* para. 14; *New Continental Broadcasting Co.*, 96 FCC 2d 544 (Rev. Bd. 1983); *Merrimac Valley Broadcasting, Inc.*, 99 FCC 2d 680 (1984); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); and *Apogee, Inc.*, 59 R.R. 2d 941 (1986).

[41] 96 FCC 2d at 994 (Comm'r Rivera, concurring statement).

[42] *Id.*

[43] Circumstances could change because of the voluntary decision of certain principals not to participate further in the proposed operation. Changed circumstances also may be due to death or disability of station principals.

[44] *See* 47 C.F.R. §73.3597(c) (1988). If more than 9 or 12 months have elapsed since the grant of a construction permit for a radio or television station, respectively, then the permittee is required to show that certain conditions have been met -- such as substantial progress has been made toward construction -- before assignment of a construction permit will be allowed. *See* 47 C.F.R. §73.3535 (1988). *See also Broadcast Construction Periods*, 59 R.R. 2d 595, 596-97 (1985).

[45] As indicated in note 12, *supra*, 6 of the 39 cases comprising the study of 1982 cases were non-settlement cases. However, 1 of the 6 cases (*B and M Communications, Inc.* -- Docket. No. 82-56, FCC 83R-74, released October 6, 1983) resulted in the construction permit being sold, thus vitiating the initial basis for the comparative grant.

[46] While it could be argued that some modification of the existing comparative criteria would be preferable to a random selection procedure, at this point we do not believe that any such modification would serve the overall public interest better than a lottery procedure. First, we note that approximately 80% of all mutually-exclusive comparative new cases now involve settlements or dispositions on other grounds where the comparative criteria are not the basis for a grant. Second, based on our expertise and experience, we believe it would be quite unlikely that new comparative criteria could be developed that would resolve or significantly ameliorate the difficulties discussed herein. Under these circumstances, a lottery procedure appears to be more desirable.

[47] The following comparative factors and qualitative enhancements would be eliminated by adoption of random selection procedures for licensing new broadcast stations: (1) integration of ownership and management; (2) present and/or proposed local residence; (3) past participation in civic activities; (4) past broadcast experience; (5) the daytimer preference; (6) female ownership and participation in station management; (7) proposed program service; (8) past broadcast record; and (9) proposed use of auxiliary power equipment for radio stations. In their place, significant preferences would be provided in lotteries for minority ownership and diversification of media ownership, as required under Section 309(i) of the Communications Act. Also see discussion at paragraph 50, *infra*, regarding the impact of a lottery approach upon both comparative coverage and Section 307(b) issues.

[48] The emphasis in paragraph 32 is directed principally to the approximately 20% of mutually exclusive comparative new cases that significantly utilize the adjudicatory process as opposed to pre-trial settlement cases. However, it should be recognized that some of the cases in this 20% category may involve non-commercial new facilities where the subject commercial comparative new criteria are not relevant. *See, e.g.*, note 63 *infra*.

[49] In this regard, our research of the 39 cases designated for hearing during the first and third quarters of 1982, described *supra* at note 12, reflects a 32.5 month average period of time from the filing of the application to grant of a construction permit. This information was derived from our examination of the official history cards in each case to obtain the date the successful application was filed and of the Mass Media Bureau's computerized Broadcast Applications Processing System to obtain the grant date of the construction permit. From these figures, the average period of time was computed. It should be pointed out that this average would have been considerably longer but for the fact that 26 of these 39 cases were settled prior to the rendering of an ALJ Initial Decision.

By way of contrast, we examined the 58 lottery winners that filed applications in the June, 1987, low power television window. This filing window period was selected because it was the most recent filing period for which the majority of the tendered applications involved in lotteries have been granted. Based upon publicly available information, the average time from filing to grant for 44 of the construction permits granted so far was 14 months. The applications not yet granted are awaiting resolution of the following post-lottery processing matters: petitions to deny (5 cases), FAA tower clearance (4 cases), concurrence of the Canadian government (1 case), and notification to the Mexican government (4 cases). Final disposition of these remaining applications should be completed by next year. Because, in general, only 6 percent of low power television lottery groups result in settlements as opposed to approximately 80 percent of comparative hearings, the average time from filing to grant would not appear to be as significantly affected by low power television settlements. Moreover, we expect that the lottery-related applications from the June, 1988, window will be granted within a substantially shorter time frame. A large majority of these lotteries (38) took place within 6 months after the applications were filed, and many of the applications of the tentative selectees are about to be granted. A summary of the data and/or other materials used to derive the information discussed in this footnote will be placed in this docket and made available for public inspection.

[50] We recognize that some delays were initially encountered with respect to low power television because this service was created and applications were accepted for filing prior to Congress authorizing the Commission to use random selection procedures for licensing in the mass media services. As a result, the Commission had a backlog of approximately 12,000 applications for low power television and no rules in place for selecting among mutually exclusive applications. Moreover, this backlog grew to 37,000 applications as 25,000 applications were filed in

response to a single "cut-off" list of applications in March, 1984. However, once the Commission received authority from Congress to use a random selection procedure for choosing applicants and adopted appropriate implementation procedures, this backlog was subsequently reduced by use of lotteries. As a result, the Commission has reduced the backlog to only 3,000 applications as of December, 1988, and has reduced the number of mutually exclusive applicants per lottery group to an average of 2 or 3 per group instead of the 100 to 200 applications that were formerly filed per group.

[51] In this regard, we note that when statutory language is plain on its face, the Supreme Court has held that "legislative history may not be used to support a construction that adds to or takes from the significance of the words employed." *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 278, (1929). *But see, e.g., National Railroad Passenger Corp. v. National Ass' n of Railroad Passengers*, 414 U.S. 453 (1974); *Ass' n of Westinghouse Salaried Employees v. Westinghouse Electric Co.*, 348 U.S. 437 (1955); and *FCC v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957). *See also American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3644 (March 22, 1988).

[52] *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1354 (D.C. Cir. 1988).

[53] *Id.* at 1362.

[54] *House Conference Report No. 97 -765*, 97th Cong., 2d Sess. 38 (1982) *(Conference Report)*.

[55] *Conference Report at 37.*

[56] 47 C.F.R. §§1.1601-1623 (1986). *See also Second Report and Order* in Gen. Docket No. 81-768, 93 FCC 2d 952 (1983), recon. denied, 57 RR 2d 427 (1984).

[57] *Conference Report* at 37.

[58] *See First Report and Order* in MM Docket No. 84-231, 100 FCC 2d 1332 (1985), *recon.*, 101 FCC 2d 638 (1985), *further recon.*, 51 Fed. Reg. 36401 (October 10, 1986), *rev'd in part, Reeder v. FCC*, No. 86-1045 (D.C. Cir., January 24, 1989).

[59] *See Notice of Proposed Rule Making* in MM Docket No. 88-375, 3 FCC Rcd 5941 (1988).

[60] *See Second Report and Order* in MM Docket No. 84-231, 101 FCC 2d 638, 648 (1985).

[61] There are currently about 205 applications pending for new AM stations or for major changes in existing facilities, of which approximately 55 are mutually exclusive. This amounts to 15 separate groups of mutually exclusive applications, with from 2 to 7 applicants per group. In addition, while it is premature at this point to make precise estimates as to the number of new stations that will result from expansion of the AM band, we would expect a significant number of such new stations to be created. *See* 3 FCC Rcd 4497, 4508-9 (1988). With respect to television, there were 38 applications pending for new television stations as of January 11, 1989, of which 20 were mutually exclusive. This constitutes 5 separate groups of mutually exclusive applications, with from 2 to 10 applicants per group. However, it should be borne in mind that, since 1987, there has been a partial freeze on amendments to the Television Table of Allotments and on applications for construction permits for new television stations in or near the top 30 TV markets in order to preserve sufficient broadcast spectrum to insure reasonable options relating to the development of high definition television. *See Order*, Mimeo No. 4074, released July 17, 1987.

[62] In adopting new rules to implement Section 309(i), we held that inclusion of a preference for women under either the "media ownership" or "minority ownership" preferences was not permissible under the statute. *Women's Preference Order*, 50 Fed. Reg. 36056 (Sept. 5, 1985). In affirming our decision in *Pappas v. FCC* 807 F.2d 1019, 1024 (D.C. Cir. 1986), however, the court said:

> We do not decide, because nothing in the case compels us to do so, whether the Commission may use its residual authority in the lottery context to grant women a preference of a different kind or lesser magnitude than the preferences established in §309(i).

We therefore invite comment on whether it would be possible to create additional preferences (for female ownership, "AM daytimers," or FM applicants who file petitions for rule making that lead to the addition of an FM channel in a contested proceeding) without diluting either the minority or diversification preferences provided under the statute. We also seek comment on whether these possible preferences or any others would serve the public interest.

Of course, if we decide at the conclusion of this proceeding to retain the comparative process in its existing form, we would leave intact both the minority and women preferences because recent appropriations legislation for the FCC contains language that effectively prohibits use of any Commission funds to repeal either of these criteria in the comparative licensing process. *See Making Appropriations for the Departments of Commerce, Justice, the Judiciary and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459 (signed October 1, 1988). However, that legislation is expressly directed at the comparative licensing process, not lotteries, and neither the express words of the statute nor the legislative history accompanying it suggests Congress' intent to apply this restriction to lotteries under Section 309(i) or to limit the Commission's discretion under Section 309(i) to determine when a random selection process would serve the public interest. Again, we invite comment on this analysis.

[63] We have reviewed lottery results in the low power television service for the third fiscal quarters of 1986, 1987 and 1988. This review shows that the total number of lottery groups was 371 and that minorities won 38% of these groups. Further, of the total number of 3,975 applications comprising the 371 different lottery groups, the total number of applications filed by minorities was 975 or approximately 25%. Thus, while minorities constituted only 25% of the applicants, they won 38% of all lottery groups. However, 140 of the 371 groups did not include any applications from minorities. Therefore, there were only 231 groups in which there was at least one minority applicant in each group and of this number, minorities won 61% of the time. Further, of the total number of 3,506 applications comprising the 231 lottery groups, the total number of applications filed by minorities in the 231 groups was 975 or approximatley 28%. Thus, while minorities accounted for only 28% of all applcations in the 231 lottery groups where each group had at least one minority applicant, minorities won in 61% of the groups.

On the media diversity side, applicants with a diversity preference won 56% of the 371 lottery groups. However, 73 of the 371 lottery groups had no diversity applicants. Of the remaining 298 lottery groups in which there was at least one diversity applicant in each group, diversity applicants won 69% of the time.

As emphasized earlier, a review of the 39 comparative hearing cases in 1982 (*see* note 12, *supra)* showed that settlements occurred in 33 of the cases and, therefore, neither media diversity nor minority ownership was a decisional factor in the agency's final grant (or denial) of a construction permit in these cases.

Of the six cases that did not result in settlements, four resulted in the granting of construction permits to applicants with significant minority ownership. Of these four, one was for a noncommercial television broadcast facility where the level of minority ownership is not a relevant comparative factor. In two of the non-settlement cases diversity was a comparative factor. A summary of the data and/or other materials used to derive this information will be placed in the docket of this proceeding and thus made available for public inspection.

[64] *Conference Report* at 38.

[65] As noted above, while the report language can evidence Congressional intent, the court has found that it is not a binding statutory requirement. *See also supra* para. 36. In any event, we tentatively conclude that our action is consistent with the legislative history, as well the clear statutory language.

[66] *See* 47 C.F.R. §§1.1601-1.1604, 1.1621-3.

[67] In the low power television service, minority preferences are given for limited partnership applicants where the majority of the partnership (computed on the basis of profits) is in the hands of a minority. *See* FCC Form 346 (Application for Authority to Contruct or Make Changes in a Low Power TV, TV Translator or TV Booster Station). However, the minority preference standard for limited partnerships in the low power television service appears to be more restrictive than that employed for minority preferences in comparative hearings where a limited partnership is involved. We seek comment on whether the existing standard for obtaining a minority preference in comparative hearings should also apply in the event we adopt a lottery procedure for full service stations.

[68] Because petitions to deny may be filed against the tentative selectee, we do not believe that it is necessary to entertain pleadings filed prior to the lottery that seek to have other applications dismissed.

[69] At the same time, however, we do not believe that it is necessary to change our "cut-off" list filing procedures for AM, noncommercial FM, and television stations or our "window" filing procedures for commercial FM stations.

[70] Under Section 75.3564(a) of the Commission's Rules, low power television and television translator applications must be "complete and sufficient" when filed; that language is the embodiment of the "letter perfect" application acceptance standard that was announced at the inception of this service. *See Report and Order* in BC Docket 78-253, 51 RR 2d 1267, 1273 (1983). *See also Kinetications, Inc.* 99 FCC 2d 169 (1984); and *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985) (affirming use of "letter perfect" standard in low power television service).

[71] FCC Form 301, Section III at 6 (October, 1986 ed.).

[72] *See, e.g., Northampton Media Associates*, 3 FCC Rcd 5164, 5167 (Rev. Bd. 1988). The "reasonable assurance" standard as to availability of funds for construction and operation of new broadcast stations was also used when applicants were formerly required to submit documentation of their financial qualifications. *See, e.g., Alexander S. Klein, Jr.*, 36 R.R. 2d 94 (Rev. Bd. 1976).

[73] We recognize that a similar proposal of utilizing a firm financial commitment standard was recently advanced, along with other suggestions, toward revising the Construction Permit Application Form (FCC Form 301). *See Notice of Proposed Rule Making* in Gen. Docket 88-328, 3 FCC Rcd 4112 (July 5, 1988). However, that proceeding envisions continuation of the comparative hearing process for initial licenses. Accordingly, our concern here is whether any additional changes beyond those that may taken in Gen. Docket 88-328, should be made in this proceeding in the event that we decide to utilize lottery procedures for selecting among mutually exclusive applicants for new radio and television stations.

[74] We also invite comment on whether we should adopt an exception for interests in publicly traded companies of less than 5% for AM, FM, and TV applications similar to the exception that exists for interests of this amount in the rural cellular rules. *See Section* 22.921(b)(2).

[75] FCC Form 346, Section III, question 7 (Februrary, 1988 ed.).

[76] Section 311(c) of the Communications Act in general allows settlements between mutually exclusive applicants for construction permits for new broadcast facilities subject to Commission approval.

[77] *Rural Cellular Service (Third Report and Order in CC Docket No. 85-388)*, 53 Fed. Reg. 18093 (May 20, 1988).

[78] For a description of Section 307(b) issues, *see supra* paras. 21-22.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Amendment of the Commission's Rules to Allow the Selection from among Competing Applicants for New AM, FM and Television Stations by Random Selection

Our proposal to extend our lottery procedures to full service broadcast facilities evidences our concern that the Commission's existing comparative procedures appear unable to bring service to the public in a timely and cost effective fashion. While it is true that lotteries have been successful in reducing massive backlogs in the low power service, our experience with cellular demontrates lotteries may create more problems than solutions.

While I am willing to explore expansions of lottery procedures to full service broadcasting, it may not be the panacea envisioned by its proponents. The Commission's ultimate responsibility is to select the *best* applicant. In our attempt to expedite the process we must not lose sight of this statutory obligation. If lottery procedures are ultimately employed, then the Commission must make sure that all lottery applicants have the highest financial, technical and character qualifications.

I am also troubled by the lack of discussion concerning amendments to the present comparative process that may reduce the delays and facilitate service to the public. For example, limiting settlements to out-of-pocket expenses or stricter financial reporting requirements may improve the process significantly. Unfortunately, the *Notice of Proposed Rule Making* does not adequately dismiss such measures or even solicit comment on them. Absent a discussion of less drastic changes to the present system, I am reluctant to "tentatively conclude" that we should consider a different method of selecting licensees.

On balance, however, the lottery proposal deserves to be open to public discussion. It must be remembered that Congress has imposed a heavy burden on the Commission to justify extension of lottery procedures to full service facilities. I intend to examine the issues in this proceeding closely to ensure that the Commission remains faithful to its statutory obligations.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Amendment of the Commission's Rules Regarding The Selection from Competing Applicants for New AM, FM, and Television Stations.

Those who spend time at comparative hearings may be reminded of Murray Kempton's observation: "Next to watching justice denied, the saddest thing under the eye of God is the sight of justice dispensed."

Like an aging movie star, our comparative criteria are most appealing when viewed from a distance. Diversification of ownership, minority and female ownership, and integration of ownership and management are all worthy goals. But up close, the comparative hearing process too often does not work well. These hearings tend to descend into endless litigation over trivia--whether an applicant was a leader of the Rotary Club or merely an active member; whether an applicant's residence lies one mile inside or one mile outside the station's proposed service area; whether a five percent owner should receive full-time or part-time integration credit. Yet, these relatively minor distinctions often are the basis for deciding who receives a construction permit.

Some might say that the wheels of justice spin slowly, but they spin fine. Even if we assume that the litigated cases uncover the "best" applicant, I would still be concerned that the worthwhile goals of the process may not be vindicated in practice. Roughly 80 per cent of all cases are settled. In those cases, the FCC may play little or no role in enforcing its comparative criteria.[1] The applicant with the worst comparative qualifications can buy out the other applicants, and the FCC routinely approves the settlement.

The only certainty in our current process is the major investment of time and money. It typically takes five years or more for a case to wend its way through our labyrinthine process, which involves an ALJ, the Review Board, the Commission, and in many cases, the U.S. Court of Appeals. Some cases drag on for more than twenty years. Delay imposes a severe cost--the public is deprived of service, even though two or more parties are ready and willing to go on the air.

Money is also a factor. We collect no data on what it costs to prosecute a hearing to its conclusion, though the legal fees alone are substantial. We do have information on settlements. In the first six months of 1988, we approved 50 settlements in FM proceedings. On average, the winner paid the other applicants a total of 79,873. In TV, with nine settlements, the average was 64,805. For our two AM settlements, the average was 15,850. How does the public benefit by having applicants pay each other 60,000-80,000 before they even begin to build a station? Would that money be better spent on providing the public with the best possible broadcast service?

While I am inclined to reexamine the problems with the comparative *process*, I do not necessarily fault the criteria. To the extent that the item tentatively concludes that the criteria are not worth keeping, I disassociate myself from it. *See, e.g., Notice* at paragraphs 17, 33(f).

By using the statutory lottery plan, we seek to preserve two valuable aspects of comparative hearings--the significant credit awarded for diversification of ownership and minority ownership. We hope to ensure that minority applicants and those with no other broadcast interests will do at least as well under a lottery as they would in a comparative hearing. We would thereby continue to leave the door cracked open for new entrants into the broadcast industry. I am, however, concerned that the statutory lottery plan does not provide for any female credit. We ask in the *Notice* whether we can continue to award credit for female ownership. I will be especially interested in comments addressing these issues. In addition, I welcome comment on the consequences of eliminating the integration factor, as our *Notice* proposes to do.

I respect the views of those who believe the FCC should make a case-by-case judgment in granting broadcast licenses, instead of holding lotteries. The legislative history of Section 309 states that we bear a "heavy burden" in adopting a lottery for full-power stations. Nevertheless, our current system appears to work so poorly that we are compelled to consider alternatives. We will no doubt receive comments urging us to reform our hearing process instead of abandoning it. I will review those comments carefully, but I also ask commenters to consider whether even an improved hearing process would warrant delaying the delivery of new service to the public.

In the RKO case, among others, I have supported adherence to our existing hearing policies, regardless of how flawed they may be. As long as a policy is in place, we should enforce it consistently and evenhandedly, rather than carving out special exceptions and making nondistinguishing distinctions. In this proceeding, we finally have a proper opportunity to assess the ultimate value of holding comparative hearings for new licenses.

FOOTNOTE FOR STATEMENT

[1] This is not to say that the settling parties do not apply the comparative criteria on their own. Therefore, I cannot conclude that settlements are on a basis that does not involve the application of the comparative criteria. *Cf. Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection (Lottery), Notice of Proposed Rulemaking,* FCC 89-28, fn.12 *("Notice").*

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-214

In the Matter of

Reorganization and revision
of Part 87 governing the
Aviation Services

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1989; Released: March 10, 1989

By the Commission:

I. INTRODUCTION

1. On July 14, 1988, we released a *Report and Order* [1] reorganizing and revising Part 87 of the Commission's Rules, 47 C.F.R. Part 87, governing the Aviation Services. Aeronautical Radio, Inc. (ARINC) filed a Petition for Reconsideration requesting two substantive revisions and certain other revisions necessary to correct errors that arose during the reorganization and revision of the rules. We also received other requests for non-substantive revisions,[2] which we have treated as informal petitions for reconsideration. By this Memorandum Opinion and Order we make the non-substantive revisions as requested. We deny, however, ARINC's substantive requests.

II. BACKGROUND

2. In the *Report and Order* in this proceeding we reorganized Part 87 substantially as proposed in the *Notice of Proposed Rule Making*. [3] In general, we simplified and clarified the rules and, where possible, eliminated regulatory barriers to provide additional flexibility for aviation communications. We also eliminated unnecessary and obsolete rules and replaced textual explanations with easy-to-read tables and charts. The result of these changes was a reduction of approximately thirty percent in the total body of Part 87.

3. Turning to the substantive changes requested, ARINC recommends that digital transmissions using emission A9W be allowed throughout the very high frequency (VHF) aeronautical band 117.975-136.000 MHz, subject only to the condition that such transmissions be secondary to voice communications. ARINC believes that there is no apparent reason to limit digital transmissions to the narrower aeronautical enroute band, 128.825-132.000 MHz, specified in Part 87 as revised. Second, ARINC requests that the bands 1535.0-1557.5 MHz and 1637.5-1660.0 MHz (L-band) be designated for prospective use in the aeronautical mobile satellite (route) service (AMSS (R)).[4] ARINC notes that this allocation was specified in former Part 87.[5] ARINC desires this change as a demonstration that "[w]hatever the final outcome of the Commission's Rule Making in [General] Docket [No.] 84-1234, the Commission intends that these L-Band frequencies continue to be available for use by aviation."[6]

III. DECISION

4. We have made the non-substantive revisions requested by ARINC and the other parties. These revisions merely correct and clarify changes made in the *Report and Order*.

5. ARINC's first substantive request concerns digital transmissions using emission A9W. ARINC seizes on an inconsistency in a footnote to the previous Part 87 emissions table[7] to argue that digital transmissions using emission A9W should be allowed for all services throughout the band 117.975-136.000 MHz, subject only to a restriction that such digital transmissions be secondary to voice communications.

6. In reorganizing Part 87 we changed the location of the emissions table (former Section 87.67(b)) in the rules. In doing so we also modified the language of former footnote 6 and renumbered it to footnote 5. The new footnote provides that the digital emission A9W "may be authorized only for audio frequency shift keying and phased shift keying for digital data links on any frequency listed in § 87.263(a)(1)."[8] Section 87.263(a)(1), in turn, refers to a narrower VHF aeronautical frequency band -- 128.825 to 132.000 MHz -- than that desired by ARINC. We took this action because the language in former footnote 6 was not consistent with other rule sections that actually authorized the use of A9W transmissions, specifically former Sections 87.293(a)[9] and 87.305.[10] These rule sections limited the authorization for A9W transmissions to the 128.825-132.000 MHz band. The new rule on this point, Section 87.265, parallels our old rule and only allows A9W emissions on the narrower band; thus, our revision of the footnote in the emissions table merely made the rules consistent. Moreover, we decline to broaden the use of the frequency band on reconsideration without our having provided interested parties with notice and an opportunity to comment upon such a significant change.

7. Additionally, ARINC requests that the aviation rules be modified to reflect that the bands 1535.0-1557.5 and 1637.5-1660.0 MHz are allocated for use in the AMSS (R). Section 87.183(p) of the old rules contained this allocation. We deleted it from the aviation rules for two reasons. First, the allocation as set forth in Section 87.183(p) was inconsistent with the allocation table contained in Section 2.106 of the Commission's Rules. Second, as the allocation for AMSS (R) is itself an issue in Gen. Docket No. 84-1234,[11] rather than amend Section 87.183(p) [87.187 in the new aviation rules], we believed that the better course would be simply to delete the allocation from the aviation rules until a final allocation is established in Gen. Docket No. 84-1234. Changing the aviation rules to reflect the AMSS (R) allocation contained in Section 2.106, prior to the conclusion of Gen. Docket No. 84-1234, serves no purpose and might cause confusion. Consequently, ARINC's request that these bands again be listed in the aviation rules is denied.

8. Further, ARINC's petition has brought to our attention that new Section 87.475(b) contains an allocation for AMSS (R). Again, this allocation serves no purpose at this time. Therefore, we are also removing these provisions from the aviation rules.[12] At the conclusion of Gen.

Docket No. 84-1234, the Commission will promulgate any necessary rules for AMSS (R) in the appropriate rule sections.[13]

IV. PAPERWORK REDUCTION ACT

9. The rule amendments adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to contain no new or modified form, information collection, or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the information collection burden that the Commission imposes on the public.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 87 IS AMENDED as set forth in the Appendix below, effective upon publication in the Federal Register.

11. IT IS FURTHER ORDERED that the petitions for reconsideration filed by ARINC and others ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

12. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 87 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 87 -- AVIATION SERVICES

1. The authority citation for part 87 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609, unless otherwise noted.

2. In Section 87.5, the term and definition of *Aeronautical enroute station* are revised to read as follows:

§ 87. 5 Definitions.

* * * * *

Aeronautical enroute station. An aeronautical station which communicates with aircraft stations in flight status or with other aeronautical enroute stations.

* * * * *

3. In Section 87.23, footnote 1 to the table in paragraph (c) is revised to read: "[1] Equivalent values of power flux density are calculated assuming a free-space characteristic impedence of 376.7 (approximately 120 pi) ohms."

4. In Section 87.37, paragraph (a)(3) is revised to read as follows:

§ 87. 37 Developmental license.

* * * * *

(a) * * *

(3) The program has reasonable promise of substantial contribution to the use of radio;

* * * * *

5. In Section 87.103, paragraph (b) is revised to read as follows:

§ 87. 103 Posting station license.

* * * * *

(b) *Aircraft radio stations.* The license must be either posted in the aircraft or kept with the aircraft registration certificate. If a single authorization covers a fleet of aircraft, a copy of the license must be either posted in each aircraft or kept with each aircraft registration certificate.

* * * * *

6. Section 87.111 is revised to read as follows:

§ 87. 111 Suspension or discontinuance of operation.

The licensee of any airport control tower station or radionavigation land station must notify the nearest FAA regional office upon the temporary suspension or permanent discontinuance of the station. The FAA center must be notified again when service resumes.

7. Section 87.131 is revised to read as follows:

§ 87. 131 Power and emissions.

The following table lists authorized emissions and maximum power. Power must be determined by direct measurement.

Class of station	Frequency band/ frequency	Authorized emission(s)	Maximum power[1]
Aeronautical advisory	VHF	A3E	10 watts
Aeronautical multicom	VHF	A3E	10 watts
Aeronautical enroute and aeronautical fixed	HF	R3E, H3E, J3E, J7B, H2B	6 kw
	HF	A1A, F1B, J2A, J2B	1.5 kw
	VHF	A3E, A9W	200 watts[2]
Aeronautical search and rescue	VHF	A3E	10 watts
	HF	R3E, H3E, J3E	100 watts
Operational fixed	VHF	G3E, F2D	30 watts
Flight test land	VHF	A3E	200 watts
	UHF	F2D, F9D, F7D	25 watts[3]
	HF	H2B, J3E, J7D, J9W	6.0 kw
Aviation support	VHF	A3E	50 watts
Airport control tower	VHF	A3E	50 watts
	below 400 kHz	A3E	15 watts
Aeronautical utility mobile	VHF	A3E	10 watts
Radionavigation land test	108.150 MHz	A9W	1 milliwatt
	334.550 MHz	A1N	1 milliwatt
	other VHF	M1A, XXA, A1A, A1N, A2A, A2D, A9W	1 watt
	other UHF	M1A, XXA, A1A, A1N, A2A, A2D, A9W	1 watt
	5031.0 MHz	F7D	1 watt
Radionavigation land Aircraft (Communication)	various[4]	various[4]	various[4]
	Aeronautical frequencies		
	UHF	F2D, F9D, F7D	25 watts
	VHF	A3E, A9W	55 watts
	HF	R3E, H3E, J3E, J7B, H2B, J7D, J9W	400 watts
	HF	A1A, F1B, J2A, J2B	100 watts
	Marine Frequencies[5]		
	156.300 MHz	G3E	5 watts
	156.375 MHz	G3E	5 watts
	156.400 MHz	G3E	5 watts
	156.425 MHz	G3E	5 watts
	156.450 MHz	G3E	5 watts
	156.625 MHz	G3E	5 watts
	156.800 MHz	G3E	5 watts
	156.900 MHz	G3E	5 watts
	157.425 MHz	G3E	5 watts
	HF[6]	R3E, H3E, J3E, J2B, F1B, A3E	1000 watts 250 watts
	MF[6]	R3E, H3E, J3E, J2B, F1B	1000 watts
	HF[6]	A3E	250 watts
(Radionavigation)	various[7]	various[7]	various[7]

Notes:

[1] The power is measured at the transmitter output terminals and the type of power is determined according to the emission designator as follows:

(i) Mean power (pY) for amplitude modulated emissions and transmitting both sidebands using unmodulated full carrier.

(ii) Peak envelope power (pX) for all emission designators other than those referred to in paragraph (i) of this note.

[2] Power and antenna height are restricted to the minimum necessary to achieve the required service.

[3] Transmitter power may be increased to overcome line and duplexer losses but must not exceed 25 watts delivered to the antenna.

[4] Frequency, emission and maximum power will be determined after coordination with appropriate Government agencies.

[5] To be used with airborne marine equipment type accepted for Part 80 (ship) and used in accordance with Part 87.

[6] Applicable only to marine frequencies used for public correspondence.

[7] Frequency, emission and maximum power will be determined by appropriate standards during the type acceptance process.

8. In Section 87.137, footnote 5 to the table in paragraph (a) is revised to read: "[5] This emission may be authorized for audio frequency shift keying and phased shift keying for digital data links on any frequency listed in § 87.263(a)(1) or § 87.263(a)(3), provided it is multiplexed on the voice carrier. If such use is on a channel used for voice communications, such use is secondary to voice communications. Ground stations must receive Commission approval prior to using this emission."

9. In Section 87.141, the second sentence of paragraph (f) is amended by adding a comma after "15 kHz" and by sub-scripting the number "10" after the word "log" and is amended by removing the words "referred to 1 kHz of" and adding in their place "greater than the attenuation at 1 kHz by" to read as follows:

§ 87. 141 Modulation requirements.

* * * * *

(f) Each frequency modulated transmitter equipped with a modulation limiter must have a low pass filter between the modulation limiter and the modulated stage. At audio frequencies between 3 kHz and 15 kHz, the filter must have an attenuation greater than the attenuation at 1 kHz by at least 40 log10 (f/3) db where "f" is the frequency in kilohertz. Above 15 kHz, the attenuation must be at least 28 db greater than the attenuation at 1 kHz.

* * * * *

10. In Section 87.147, paragraph (c)(3) is amended by changing the frequency band indicated as "108.000 MHz to 136.000 MHz" to "108.000 MHz to 117.975 MHz" to read as follows:

§ 87. 147 Type acceptance of equipment.

* * * * *

(c) * * *

(3) The frequency bands are as follows: 74.8 MHz to 75.2 MHz; 108.000 MHz to 117.975 MHz; 328.600 MHz to 335.400 MHz; 960.000 MHz to 1215.000 MHz; 1559.000 MHz to 1626.500 MHz; 5000.000 MHz to 5250.000 MHz; 14.000 GHz to 14.4000 GHz; 15.400 GHz to 15.700 GHz; 24.250 GHz to 25.250 GHz; and 31.800 GHz to 33.400 GHz.

11. In Section 87.173, paragraph (b) is amended by adding ",Q" to the "Subpart" column opposite the 9300-9500 MHz frequency band entry.

12. In Section 87.217, paragraph (a)(1) is revised to read as follows:

§ 87. 217 Frequencies.

(a) * * *

(1) 122.950 MHz at airports that have a part-time or full-time control tower or have a part-time or full-time FAA flight service station.

* * * * *

13. In Section 87.263, the last sentence of paragraph (a)(2) is amended by adding the number "8" before the abbreviation "kHz," and paragraph (e) is amended by adding the frequency "17925.0" appropriately to the list of frequencies, to read as follows:

§ 87. 263 Frequencies.

(a) * * *

(2) A system or network of interconnected enroute stations may employ offset carrier techniques on the frequencies listed in paragraph (1). The carrier frequencies of the individual transmitters must not be offset by more than +8 kHz.

* * * * *

(e) *Long distance operational control.* Long distance operational control frequencies provide communications between aeronautical enroute stations and aircraft stations anywhere in the world for control of the regularity and efficiency of flight and safety of aircraft. World-wide frequencies are not assigned by administrations for MWARA and Regional and Domestic Air Route Area (RDARA).

kHz	kHz
3013.0	10075.0
3494.0	11342.0
5529.0	11348.0
5538.0	13330.0
6637.0	13348.0
6640.0	17925.0
8933.0	21964.0
10033.0	

* * * * *

14. In Section 87.265, the first sentence is amended by adding the words "or § 87.263(a)(3)" before the word "may" to read as follows:

§ 87. 265 Administrative communications.

Domestic VHF aeronautical enroute stations authorized to use A9W emission on any frequency listed in § 87.263(a)(1) or § 87.263(a)(3) may transmit digital administrative communications on a secondary basis, in addition to the operational and control communications routinely permitted under § 87.261(a) above. Such secondary administrative communications must directly relate to the business of a participating aircraft operator in providing travel and transportation services to the flying public or to the travel, transportation or scheduling activities of the aircraft operator itself. Stations transmitting administrative communications must provide absolute priority for operational control and other safety communications by means of an automatic priority control system.

15. In Section 87.303, the last sentence of paragraph (d)(1) is amended by correcting the abbreviation of the term "megahertz" to read: "The Maritime Mobile-Satellite Service will be the only primary service in the 1530.000-1535.000 MHz band after January 1, 1990."

16. In Section 87.305, the next-to-last sentence in paragraph (a)(1) is amended by correcting the title of the NTIA document to read: "The Committee must coordinate in writing all requests for frequencies or proposed operating changes in the 1435-1535 MHz and 2310-2390 MHz bands with the responsible Government Area Frequency Coordinators listed in the NTIA "Manual of Regulations and Procedures for Federal Radio Frequency Management."

17. In Section 87.417, paragraph (a) is amended by adding a period after "(see Subpart L)" and paragraph (b) is amended by adding the following sentence after the list of three frequencies: "The Commission may exempt from these watch requirements the licensee of an airport control tower station if a satisfactory showing has been made that such an exemption will not adversely affect life and property in the air."

18. In Section 87.421, the introductory paragraph is amended by correcting the first listed frequency band from "188.000-121.400 MHz" to "118.000-121.400 MHz."

19. In Section 87.475, paragraphs (b)(8) and (c)(1) are revised to read as follows:

§ 87. 475 Frequencies.

* * * * *

(b) * * *

(8) 1559-1626.5 MHz: The use of this band is limited to airborne electronic aids to air navigation and any associated land stations.

(c) * * *

(1) The frequencies set forth in § 87.187(c), (e) through (j), (r), and (t) and § 87.475(b)(6) through (10), and (12) may be assigned to radionavigation land test stations for the testing of aircraft transmitting equipment that normally operate on these frequencies and for the testing of land-based receiving equipment that operate with airborne radionavigation equipment.

* * * * *

20. In Section 87.475, paragraph (c)(2) is amended by correcting the punctuation after the word "localizer" from a comma to a semi-colon.

21. Section 87.503 is amended by correcting the address of the Civil Air Patrol Headquarters to read as follows:

§ 87. 503 Supplemental eligibility.

Licenses for Civil Air Patrol land and mobile stations will be issued only to Wings or the Headquarters of the Civil Air Patrol. All applications must be submitted to the Commission via Civil Air Patrol Headquarters, Maxwell Air Force Base, AL 36112. A single fleet license will be issued to Civil Air Patrol Headquarters and to each Civil Air Patrol Wing to authorize all Civil Air Patrol Station transmitters operated by that Wing or Headquarters.

FOOTNOTES

[1] *Report and Order* in PR Docket No. 87-214, 3 FCC Rcd 4171 (1988).

[2] These include requests from Rockwell International [Letter from H.T. Blaker to Robert E. Mickley, Chief, Aviation & Marine Branch, Private Radio Bureau, Federal Communications Commission] and Keller and Heckman [Letter from Martin W. Bercovici to Robert E. Mickley, Chief, Aviation & Marine Branch, Private Radio Bureau, Federal Communications Commission], as well as staff recommendations.

[3] *See Notice of Proposed Rule Making* in PR Docket No. 87-214, 2 FCC Rcd 4069 (1987).

[4] AMSS (R) is a mobile satellite service used for aeronautical communications of enroute flights related to safety and regularity of flight. *See, e.g., Allocation Order*, Gen. Docket Nos. 84-1231, 84-1233, 84-1234, 2 FCC Rcd 1825, 1844, 1865 n. 115 (1986).

[5] Petition for Reconsideration of ARINC at 6; *see* 47 C.F.R. § 87.183(p) (1987).

[6] Petition for Reconsideration of ARINC at 7.

[7] 47 C.F.R. § 87.67(b) n. 6 (1987). The footnote reads, in pertinent part: "This emission may be authorized only for audio phase and frequency shift keying for digital data link purposes in the band 117.975-136 MHz when the channel on which the signal is transmitted is not used for voice communications, or if the channel is used for voice communication the emission is authorized as specified herein, provided it is multiplexed on the voice carrier without derogation to voice signals."

[8] 47 C.F.R. § 87.137(a) n. 5.

[9] 47 C.F.R. § 87.293(a) (1987).

[10] 47 C.F.R. § 87.305 (1987).

[11] *See, e.g., Memorandum Opinion and Order* in Gen. Docket Nos. 84-1231, 84-1233, 84-1234, 2 FCC Rcd 6830 (1987).

[12] We have retained the portion of the L-band pertaining only to airborne electronic aids to air navigation and to associated land stations because these portions of the L-band are not at issue in Gen. Docket No. 84-1234. *See* 47 C.F.R. § 87.475(b)(8), as given in the *Report and Order*.

[13] To the extent that ARINC's request arises from its concerns about how we ultimately may resolve Gen. Docket No. 84-1234, we note that this present, unrelated proceeding is not the appropriate forum for expressing such concerns. ARINC has fully voiced its arguments in Gen. Docket No. 84-1234. *See, e.g.*, Reply in Gen. Docket No. 84-1234 (submitted Feb. 26, 1988)(ARINC and others constituting the "Aviation Parties); Petition for Further Reconsideration in Gen. Docket No. 84-1234 (submitted Dec. 28, 1987)(ARINC and others constituting the "Aviation Parties"). Those arguments will be considered and addressed in that docket, and nothing is to be gained from addressing them here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-68

In the Matter of

Policies Regarding Detrimental
Effects of Proposed New Broadcasting
Stations on Existing Stations

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1989; Released: March 10, 1989

By the Commission: Commissioner Quello concurring and issuing a statement.

1. Before the Commission is a petition, filed by the National Association of Broadcasters (NAB), seeking reconsideration and/or clarification of the Commission's *Report and Order* in MM Docket 87-68 (*Report and Order*) abolishing the *Carroll* doctrine and the related UHF Impact Policy.[1] NAB requests that the Commission reconsider portions of the *Report and Order* which, it maintains, suggest that the Commission will no longer consider economic impact in general Rule Makings and policy statements. Alternatively, NAB requests that the Commission clarify that the *Report and Order* was not meant to preclude consideration of economic impact issues in proceedings other than those involving individual licensees.

2. The *Report and Order* was the outgrowth of a *Notice of Inquiry* [2] we adopted on March 20, 1987, to solicit comment on whether to abolish the *Carroll* doctrine [3] and the UHF Impact Policy,[4] both of which address the issue of economic injury to existing broadcast licensees. The *Carroll* doctrine, which stemmed from a 1958 Court of Appeals decision, generally permitted an existing broadcaster to offer proof that it would suffer detrimental economic effects which would result in a net loss of service to the public if the Commission were to grant an application for a new competing station. If the evidence was substantial, then the Commission would conduct a hearing and make findings on the issue. Under the UHF Impact Policy, the Commission would consider the adverse economic impact on existing or potential UHF stations of the grant of applications to initiate or improve VHF service. Our *Notice* sought comment on the lack of public benefit from the policies, the potential for their use in an anticompetitive manner, and the viability of the ruinous competition theory espoused under the *Carroll* doctrine.

3. After review and analysis of the comments submitted in response to the *Notice*, the Commission issued a *Report and Order* concluding that elimination of the *Carroll* doctrine and the UHF Impact Policy would better serve the public interest. There, the Commission observed that the concept of ruinous competition underlying the *Carroll* doctrine, *i.e.*, that competition in broadcasting can, in some situations, be ruinous to either an existing station or the new station in a way that is damaging to the overall service received by the public, is no longer a widely accepted economic theory. The court's reasoning in *Carroll* was based on the assumption that a new station will compete against an existing station for the same advertisers, and as a result, revenue to each station would decrease, thereby injuring or destroying its ability to provide adequate service to the public. We questioned the validity of this premise, and determined that, while there is not an infinite amount of advertising revenue available in a market, the total amount of revenue is likely to increase when additional stations enter a market because they tend to seek out new sources of advertising. Because the new station may obtain much of its revenue from new advertising sources rather than from existing advertisers, the addition of a new station might well result in the same or improved service to the public by local broadcasters.[5] The Commission concluded that elimination of the *Carroll* doctrine would serve the public interest and was legally justified. As for the UHF Impact Policy, we determined that the growth of the UHF service and the adoption of Commission rules which decreased technical differences between UHF and VHF service made it no longer in the public interest to continue to protect the UHF service by restricting the entry of new VHF stations. In fact, we determined that such a restriction might adversely effect the public interest by hindering new VHF service. We concluded, therefore, that the public would be better served if we refrained from considering the impact of individual VHF allotments or applications on existing or potential UHF stations.

4. The petition before us challenges our *Report and Order* on the ground that it goes beyond the scope of the *Notice*. It maintains that the *Notice* indicated that this proceeding would be limited to consideration of the economic impact of new entrants on existing full service broadcast stations in individual licensing proceedings, whereas the *Report and Order* suggests the Commission will no longer consider such impact in any of its Rule Making and policymaking proceedings. NAB asserts that this decision implies a judgment by the Commission that economic impact is never a valid public interest consideration in policy proceedings involving the broadcast industry. In fact, NAB claims, there are indications throughout the *Report and Order* that when deciding whether authorizing a new broadcast operation is in the public interest, the only question the Commission will consider is whether competition will be increased as a result of the entry of a new broadcaster. NAB also challenges our conclusion in the *Report and Order* that the theory of ruinous competition, which underlay the *Carroll* doctrine, is not valid in the broadcast field. NAB argues that in a regulated industry, the adverse economic impact of new stations on existing stations should be recognized to avoid a decrease in the level of service to the public.

5. The NAB requests that if the *Report and Order* intended to indicate that adverse economic impact issues will not be considered in the context of Rule Making proceedings, the Commission should reconsider its decision. Alternatively, NAB states that, if this was not the Commission's intent, it should clarify the *Report and Order* to avoid such a misreading.

6. The *Notice* in this proceeding was clearly limited to claims of economic injury in "licensing and allotment proceedings."[6] In response to NAB's concerns that our

final action in that proceeding might address more generalized issues of economic injury, we stated in the *Report and Order* that such action was beyond the scope of the proceeding.[7] To the extent there may, nonetheless, have been any misunderstanding, we hereby reiterate that the action taken in this proceeding is limited to licensing and allotment proceedings.

7. Further, NAB merely seeks to reassert the same arguments which were previously considered by the Commission in the *Report and Order* and were disposed of or deemed to be beyond the limited scope of this proceeding.[8] It is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken. The public interest in expeditious resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered.[9]

8. Accordingly, IT IS ORDERED, That the Petition for Reconsideration and/or Clarification filed by the National Association of Broadcasters IS GRANTED to the extent indicated above and otherwise IS DENIED.

9. Authority for this action is contained in Sections 4(i), 303(g), 303(r), and 405 of the Communications Act of 1934, as amended, and Sections 1.106 and 1.429 of our rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations*, 3 FCC Rcd 638 (1988).

[2] *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, Notice of Inquiry* in MM Docket No. 87-68, 2 FCC Rcd. 3134 (1987) (*Notice*).

[3] *See Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) (*Carroll*).

[4] *See Triangle Publications., Inc.*, 29 FCC 315 (1960), *aff'd, Triangle Publications, Inc. v. FCC*, 291 F.2d 342 (D.C. Cir. 1961).

[5] While the *Carroll* doctrine arose in a judicial decision, we concluded that the flexibility of our statutory public interest standard, in conjunction with the broad discretion the Supreme Court has afforded the Commission in similar actions in other areas, grants the Commission the legal authority to eliminate the *Carroll* doctrine. A similar issue was raised when the Commission decided to abandon its policy of holding hearings when a station changed entertainment formats. *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order* in Docket No. 20682, 60 FCC 2d 858 (1976), *recon. denied*, 66 FCC 2d 78 (1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (1979), *rev'd*, 450 U.S. 582 (1981). Like the *Carroll* doctrine, the "format doctrine" was imposed by the court of appeals as a means of determining if a station was broadcasting in the public interest. The Supreme Court affirmed the Commission's decision based on the flexibility of the public interest standard, the broad discretion afforded the Commission, and the reasonableness of the Commission's reliance on the marketplace.

[6] *Notice, supra* note 2, at para. 1.

[7] *Report and Order, supra* note 1, at para. 23.

[8] In this regard, NAB again argues that the Commission has entrusted its public interest considerations entirely to the marketplace, that the regulated nature of broadcasting dictates that the regulators take into account the economic impact of new competitors on existing broadcasters, and that, as a result of increased competition, the advertising revenue base of a market will be depleted, making it difficult for a station to obtain the funds necessary to provide quality service to the public. These issues were addressed in the *Report and Order*. However, NAB does argue for the first time that we only cited one source (F.M. Scherer, *Industrial Market Structure and Economic Performance*, second edition, (Chicago, IL., 1980) pp. 212-216) for our conclusion that ruinous competition is no longer a valid theory in broadcasting, and that this source is insufficient because it does not take into account the particulars of the broadcast industry. This ignores the fact that our analysis was based not just on the particular source in question, which was cited as a general survey of the economic literature in this area, but on the extensive authorities cited therein as well. Moreover, although this source did not consider the broadcast industry in particular, in the *Report and Order*, we did carefully evaluate the validity of the ruinous competition theory in a broadcasting context before reaching our conclusion that the theory did not provide adequate justification for the C arroll Doctrine. As we stated in the *Report and Order*, however, consideration of the impact of translators on full service stations was beyond the scope of this proceeding.

[9] *Practices and Procedures*, 46 RR 2d 524, 526 (1979).

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (MM Docket No. 87-68)

As I observed in my previous statement to the *Report and Order* in this proceeding, the ability to plead *Carroll* Doctrine issues in proceedings involving individual applications no longer serves the public interest. Because *Carroll* issues are rarely, if ever, designated for hearing, there is little need to retain the policy as a procedural mechanism. Retaining the doctrine merely serves as a vehicle to delay the Commission's processes. However, once again I must disagree with the analysis contained in the Commission's decision, particularly with respect to the conclusions regarding the theory of ruinous competition.

The *Memorandum Opinion and Order* reaffirms the initial decision that the theory of ruinous competition is not valid in the broadcast field. However, there is no evidence in the record to support this conclusion. The Commission cites no authority that examined the theory of ruinous competition as it relates to broadcasting. Rather, the Commission relies on general statements from one source. In response to this criticism, the Commission now states that the analysis was based not on one source but on a review of the economic literature. *See Memorandum Opinion and Order* at para 7 n. 8. (citing F.M. Scherer, Industrial Market Structure and Economic Performance, second edition, Chicago, Il., 1980) Unfortunately, the Commission ignores Mr. Scherer's observation that the theory of ruin-

ous competition "in recent years has been propounded by a few American economists and by many prominent scholars abroad." *Scherer* at 216. In addition, noted economist Alfred E. Kahn concluded, "The possibility must be conceded, then, that competition may in certain circumstances be excessively strong and that restrictions on it can produce improved performance" Alfred E. Kahn, *The Economics of Regulation*, Vol 2 (New York, N.Y. 1971) at 172-178. I raised these criticisms in my initial concurring statement. They remain unanswered on reconsideration.

The only evidence relating to broadcasting is a study which purportedly demonstrates that additional radio stations are likely to attract 50 to 70 percent of their revenues from "new" advertising sources. James A. Brown Jr., "Statistical Determinants of Radio Station Revenues and Trading Prices," Federal Communications Commission Office of Plans and Policy, August 1982 at 3-4. This study, however, is limited to radio. There is nothing in the record examining the economics of television. Moreover, the study is not inconsistent with a finding that there may be ruinous competition in broadcasting. Assuming, *arguendo*, the validity of the study's conclusions, it does not purport to analyze the effect of diverting 30 to 50 percent of the advertising base from existing stations throughout a local market. It is quite probable a diversion of this magnitude would have a dramatic effect on these station's ability to meet their public service obligations. This concern was raised in my initial concurring statement. The Commission remains silent on reconsideration.

I find it quite ironic that the Commission should adopt a new regime of snydicated exclusivity based, in part, on the concept that audience diversion from local broadcasters is harmful. At the same time, we are acknowledging in this proceeding that a diversion of up to 50% of the revenues from existing facilities in a market should not be a matter of concern to the Commission when processing individual applications. Those who compete in the marketplace recognize the detrimental effect of increased fragmentation and ruinous competition. Apart from my own "real world" broadcast experience, I am sure that most AM and UHF broadcasters would disagree with the Commission's "text book" conclusions.

I am happy to see the Commission, on reconsideration, has limited the precedential value of this decision to proceedings involving specific individual applications. In other words, the Commission will consider the impact of allocating additional stations on existing facilities, but only in the context of generalized rule makings to creating new services. I must confess, however, that it is difficult to figure out why ruinous competition is not considered in processing individual applications, where additional stations may be added to a market, but may be a factor in general rule making proceeding that achieves the same result. This inconsistency illustrates the basic problem with the Commission's analysis. The conclusions concerning the lack of ruinous competition in broadcasting raise broader, more fundamental, policy concerns than simply eliminating the *Carroll* Doctrine. Despite the limiting language of the *Memorandum Opinion and Order*, the economic conclusions of the item have broader implications.

I believe we should be concerned about policies that are designed to increase, *ad infinitum*, the number of broadcast facilities in any particular market. The Commission imposes upon broadcasters unique public interest programming responsibilities. Indeed, the Commission in its deregulation orders has acknowledged that the levels of issue-responsive programming necessary to meet our obligations will not be provided as a natural byproduct of the marketplace. Constantly increasing the level of competition not only provides the incentive for broadcasters to be more efficient, but it also provides a disincentive for broadcasters to engage in programming that is not market driven.

Simply stated, as long as the Commission requires broadcasters to provide public interest programming that may not be supported by the market, it should attempt to create an economic environment that facilitates the provision of such programming. As I observed in my initial statement, pursuit of competition, in and of itself, should not be the controlling element in broadcast policy. Market incentives should be employed where they are consistent with the Commission's overall public interest objectives. In this regard, the term public interest encompasses more than the narrow concern for market interest efficiencies. I fear the Commission's findings concerning the lack of ruinous competition ignore this important principle.

While the issue was not raised directly on reconsideration, I again stress my concern over eliminating the UHF Impact Policy. It is common knowledge that UHF television suffers from handicaps that stem from its propagation characteristics. You cannot change the law of physics. I am sure that the vast majority of UHF broadcasters would dispute the Commission's ivory tower analysis. Therefore, we should retain the UHF Impact Policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-199

In the Matter of

Amendment of Section 73.202(b), RM-6306
Table of Allotments,
FM Broadcast Stations.
(Fairbury, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1989; Released: March 10, 1989

By the Chief, Allocations Branch:

1. At the request of Siebert Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3012 (1988), proposing the substitution of Channel 257C1 for Channel 257A at Fairbury, Nebraska, and the modification of its license for Station KUTT(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received. Channel 257C1 can be allotted to Fairbury in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by substituting Channel 257C1 for Channel 257A at Fairbury, Nebraska, since it could enable Station KUTT(FM) to expand its coverage area. As proposed, we shall modify petitioner's license for Station KUTT(FM) to specify operation on Channel 257C1. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Fairbury, Nebraska	257C1

3. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Siebert Communications, Inc. for Station KUTT(FM), Fairbury, Nebraska, IS MODIFIED to specify operation on Channel 257C1 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-08-18 and West Longitude 97-10-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-261

In the Matter of

Amendment of Section 73.202(b), RM-6339
Table of Allotments,
FM Broadcast Stations.
(Altamont, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 15, 1989; Released: March 10, 1989

By the Chief, Allocations Branch:

1. At the request of Western States Broadcasting (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 3631 (1988), proposing the allotment of Channel 300A to Altamont, as the community's second local FM service. Comments in opposition to the proposal were filed by Key Broadcasting, Inc., licensee of Stations KAGO-AM-FM, Klamath Falls, Oregon, and Wynne Broadcasting Company, Inc., licensee of Station KKRB, Klamath Falls. The petitioner filed reply comments supporting the allotment in which it reiterated its intention to apply for Channel 300A, if allotted to Altamont. Todd Communications, Inc., licensee of Station KLAD-FM, Klamath Falls, filed reply comments in opposition.

2. Subsequent to the close of the record herein, petitioner filed a request for dismissal of its petition for rule making, stating that it no longer will pursue the allotment of a second channel to the community. No other party expressed an interest in use of the channel. Therefore, in accordance with Commission policy, we shall dismiss petitioner's request for the allotment of Channel 300A at Altamont.

3. Accordingly, IT IS ORDERED, That the request of Western States Broadcasting seeking the allotment of Channel 300A to Altamont, Oregon, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-268

In the Matter of

Amendment of Section 73.202(b), RM-6141
Table of Allotments,
FM Broadcast Stations.
(Chandler, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1989; Released: March 10, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 3972 (1988), issued in response to a petition filed by Brent R. Wookey (petitioner), proposing the allotment of FM Channel 228A to Chandler, Indiana, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 228A to Chandler, Indiana, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 228A can be allotted to Chandler in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Chandler, Indiana	228A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 228A at Chandler, Indiana, will open on **April 27, 1989,** and close on **May 30, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for this determination are those of the city reference point at 38-02-36 and 87-22-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-622

In the Matter of

Amendment of Section 73.202(b), RM-5844
Table of Allotments,
FM Broadcast Stations.
(Pueblo, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1989; Released: March 10, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 660 (1988), proposing the substitution of Channel 264C for Channel 264C1 at Pueblo, Colorado, and modification of the license of Surrey Front Range Limited Partnership (SFRLP) for Station KATM-FM accordingly.[1] The petitioner filed supporting comments. No opposing comments were received.

2. Channel 264C can be allotted to Pueblo at the petitioner's specified site[2] in conformity with the minimum distance spacing requirements of Section 73.207(b) of the Commission's Rules.

3. On the basis of the above, the Commission believes the public interest would be served by substituting Channel 264C for Channel 264C1 at Pueblo, Colorado, since it could provide an additional wide coverage area FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KATM-FM to specify operation on Channel 264C in lieu of Channel 264C1 at Pueblo, Colorado, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Pueblo, Colorado	245C, 255C, 260C, 264C, 283C1, 296A, 300C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Surrey Front Range Limited Partnership for Station KATM-FM, IS MODIFIED, effective **April 26, 1989,** to specify operation on Channel 264C in lieu of Channel 264C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time this proposal was filed, SurCo of Pueblo, Inc. was the licensee of Station KATM-FM. An assignment of the construction permit and license to SFRLP (BAPLH-870710EB) was subsequently granted July 29, 1987, and consummated December 7, 1987.

[2] Coordinates at the petitioner's specified site for Channel 264C at Pueblo are 38-35-00 and 104-31-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-109

In the Matter of

Amendment of Section 73.202(b), RM-5957
Table of Allotments,
FM Broadcast Stations.
(Basalt, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1989; Released: March 10, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 1630 (1988), issued in response to a petition filed by Basalt Communications Company (petitioner), proposing the allotment of FM Channel 291A to Basalt, Colorado, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 291A to Basalt, Colorado, since it could provide a first local broadcast service to the community.

3. As indicated in the *Notice*, Channel 291A can be allotted to Basalt in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 9.5 kilometers (5.9 miles) southwest[1] of the community to avoid short spacing to Station KBPI-FM, Channel 290C, Denver, Colorado.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Basalt, Colorado	291A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 291A at Basalt, Colorado, will open on **April 27, 1989,** and close on **May 30, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Reference coordinates at the restricted site are 39-20-48 and 107-08-18.

[2] Reference coordinates at the licensed site of Station KBPI-FM are 39-43-59 and 105-14-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-179

In the Matter of

Amendment of Section 73.202(b),	RM-6034
Table of Allotments,	
FM Broadcast Stations.	
(Eufaula, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 21, 1989; Released: March 10, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 2541 (1988), issued in response to a petition filed by Paul H. Reynolds and Virgle Leon Strickland (petitioners), proposing the allotment of FM Channel 250A to Eufaula, Alabama, as that community's second local FM broadcast service. Petitioners filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 250A to Eufaula, Alabama, since it could provide an additional local FM broadcast service to the community.

3. As indicated in the *Notice*, Channel 250A can be allotted to Eufaula in conformity with the minimum distance separation requirements set forth in Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 6.2 kilometers (3.8 miles) north[1] of the community to avoid short spacing to Station WJAD(FM), Channel 247C, Bainbridge, Georgia.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Eufaula, Alabama	224A,250A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 250A at Eufaula, Alabama, will open on **April 27, 1989,** and close on **May 30, 1989.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Reference coordinates at the restricted site are 31-56-56 and 85-08-42. Although the *Notice* indicated that this restriction was also required to avoid a conflict with a rule making proposal to allot Channel 249A to Ariton, Alabama (RM-6033), that proposal was recently denied by the Commission. *See Report and Order* in MM Docket No. 88-148, released January 30, 1989.

[2] Reference coordinates at the licensed site of Station WJAD(FM) are 31-09-12 and 84-32-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1989

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not released to the public or published in the FCC Record (*See* 0.445(a) of the rules). However, in order to provide the public with a clearer understanding of this new process, these decisions will be made available to the public. Periodically, the Managing Director will release a Public Notice listing the decisions he has made on these matters. The decisions will then be placed in General Docket 86-285. A copy of the decision will also be placed in the appropriate docket, if one exists. In the future, it may be decided to publish only those decisions that establish new precedents or may be of wide interest. All decisions will continue to be placed in the appropriate docket.

The following Managing Director decisions are released for information:

Marantha Christian Network - Request for Refund of Hearing Fee Granted- New TV Station at Yauco, Puerto Rico (MMB Docket 88-466) (December 28,1988)

Telecommunications, Inc. - Request for Refund of Filing Fee Granted - TCI Cablevision of Kentucky, Inc. at Winchester, KY (December 29, 1988)

Continental Cablevision of New England, Inc. - Request for Refund of Filing Fee Granted (January 4, 1989)

H. James Sharp - Request for Refund of Filing Fee Denied - New TV Station on Channel 62 at Panama City, FL (January 4, 1989

G & D Communications, Inc. - Request for Refund of Hearing Fee Granted -Television Permit for Channel 20 at Enid, OK (MMB Docket 87-330) (January 4, 1989)

The MacDonald Broadcasting Company - Request for Refund of Filing Fee Granted - WEVZ-FM at Cadillac, MI (January 18, 1989)

Taos County Radio - Request for Refund of Hearing Fee Granted - FM Station on Channel 260A at Taos, NM (MMB Docket 88-482) (January 23, 1989)

Robert Wilson & Patricia Phipps (W&P) - Request for Refund of Hearing Fee Denied - New FM Station at Custer, SD (MMB Docket 88- 190) (January 23, 1989)

Computerized Cellular Engineering, Inc. on behalf of Shasta Cellular Group - Request for Reinstatement of Rural Cellular Lottery Application Due to "NSF" Check Denied (February 13, 1989)

For further information, contact Thomas M. Holleran at (202) 632-5316.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JOHN FLYNN FOIA Control No. 88-188

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1989; Released: March 10, 1989

By the Commission:

1. Before the Commission for its consideration is an Application for Review of the Common Carrier Bureau's initial decision granting the above-referenced request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In particular, Pacific Bell and Nevada Bell (the Pacific Companies) object to the Common Carrier Bureau's decision to release a portion of a letter they had written to the Bureau. As we find that this proceeding is now moot, we are vacating the Bureau's decision below concerning this letter and dismissing the Pacific Companies' Application for Review.

2. By letter dated October 3, 1988, Professor John J. Flynn of the University of Utah requested, pursuant to the FOIA, that the Commission provide him with a "copy of the [Commission's] 'Inside Wiring Survey.'" In addition, his FOIA request contained a request for "copies of all writings . . . in the possession of the FCC that relate or pertain to Bell Operating Company customer options for maintenance of inside wiring." A letter that the Pacific Companies had recently sent to the Common Carrier Bureau's Accounting Systems Branch in response to a request for information on inside wiring fell within the request. The letter addressed five questions that the Branch had asked; of those five questions, the Pacific Companies sought confidential treatment, pursuant to sections 0.457(d) and 0.459 of the Commission's rules, for the answer that concerned the percentage of the Pacific Companies' customers that subscribe to their inside wiring plans. The Pacific Companies contended that this information was exempt from disclosure pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4).[1] *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976). The Common Carrier Bureau disagreed and decided to release the letter in its entirety. *See* Letter to Mr. John J. Flynn from Gerald Brock, Chief, Common Carrier Bureau (November 8, 1988). This Application for Review essentially reiterates the Pacific Companies' Exemption 4 argument and suggests that the matter may be moot because it appears that Professor Flynn no longer has an interest in obtaining the contested agency record.

3. In response, Professor Flynn submitted a letter dated November 29, 1988, which states that he "take[s] no position on the merits of the objection to production of the [Pacific Companies'] information" and that he is "not in need of their information."

4. Because Professor Flynn has no further interest in the contested information, it appears that his FOIA request has been fully satisfied. Under these circumstances, there remains no controversy and, thus, the matter has become moot. *See, e.g., Crooker v. Department of State*, 628 F.2d 9, 10 (D.C. Cir. 1980); *Warden v. FBI*, 530 F. Supp. 66, 68-69 (N.D. Ill. 1981). Further, as the proceeding is now moot, we decline to address the legal issues presented and vacate the Bureau's decision insofar as it addresses the request for confidentiality.

5. Accordingly, IT IS ORDERED that the portion of the Bureau's decision addressing the request for confidentiality IS VACATED and the Application for Review filed by Pacific Bell and Nevada Bell IS DISMISSED as moot.

The officials responsible for this action are the following Commissioners: Patrick R. Dennis, Chairman, James H. Quello and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Exemption 4 excludes from the FOIA's disclosure mandate "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-128

In the Matter of

Revision of Part 21 of
The Commission's Rules

ORDER ON RECONSIDERATION

Adopted: February 15, 1989; Released: March 10, 1989

By the Commission:

I. INTRODUCTION

1. In the *Report and Order* in this proceeding we adopted a comprehensive revision of Part 21 of our Rules.[1] Part 21 governs the construction, licensing and operation of common carrier domestic fixed radio facilities. We have received two petitions seeking reconsideration of certain aspects of the *Report and Order*. After reviewing the petitions, we have decided that partial reconsideration is warranted.

II. THE REPORT AND ORDER

2. The *Report and Order* had three objectives. First, it sought to make our licensing procedure as efficient as possible for affected licensees and our staff. Second, it attempted to update and simplify the Rules to reflect recent changes in the telecommunications industry and the introduction of new services such as the Multichannel Multipoint Distribution Service (MMDS) and the Digital Electronic Message Service (DEMS). Third, it sought to eliminate those requirements that are no longer necessary to our licensing procedure.

3. Among the changes made to accomplish these three objectives were changes in the prior coordination requirements; introduction of a one-step licensing procedure (which eliminated construction permits); and elimination of some information previously required in the applications, including specifying applicant certification as the manner of demonstrating financial qualifications to construct and operate a station. Other changes included adopting strict requirements for extensions of time for construction, designed to prevent warehousing and to ensure that facilities are constructed without delay. Finally, we eliminated DEMS network classification distinctions to increase flexibility for licensees and modified channel eligibility requirements in the 10 GHz band.

4. The comprehensive revision of Part 21 of the Commission's Rules has drawn two petitions for reconsideration. The first petition was filed on behalf of Association for Higher Education of North Texas, Catholic Television Network, Illinois Institute of Technology, Indiana Higher Education Telecommunication System, Northeastern University, Region IV Educational Service Center, Rutgers University, Stanford University, Trans Video Communications, Inc. and University of Texas Health Science Center (collectively "the Educators"). The second petition was filed on behalf of The Microband Companies Incorporated (Microband).[2]

III. THE PETITIONS

5. The Educators, all of whom, we are advised, are licensees of Instructional Fixed Television Service (ITFS) systems, request that we reconsider those portions of the *Report and Order* that amended the procedures for processing Part 21 applications for minor modifications to MMDS facilities, specifically, Sections 21.41, 21.42 and 21.902 of the Rules. [3] Their stated concern is that these rule sections deprive ITFS licensees, who may operate facilities on frequencies shared with MMDS licensees, of an effective opportunity to challenge or halt proposed modifications of MMDS facilities that could adversely affect ITFS operators. The Educators observe that under the rule changes adopted in the *Report and Order*, MMDS applications for certain minor modifications, such as changes in Effective Radiated Power (ERP) and transmit antenna height, will be automatically granted if no objections to them are made within 21 days of public notice and if the applicants are not otherwise informed by the Commission.

6. Twenty-one days, the Educators say, is not a sufficient time frame within which to conduct an engineering review of the proposed changes and to prepare an engineering statement and objection. This is especially true, they say, in those cases when the ITFS operator is an educational institution and the proposed changes occur during a vacation period, and when the ITFS operator must rely on the services of outside engineering consultants, because such consultants often require significant advance notice. Consequently, the Educators submit that Sections 21.41 and 21.42 should be revised to permit interested parties a full 30 days to submit an analysis of, or objections to, minor modification applications and minor amendments concerning MMDS facilities within their service area.

7. The Educators' second concern is with the 60-day cumulative affect provisions of Sections 21.41 and 21.42. Pursuant to these provisions, applicants and licensees in the Point-to-Point Microwave Radio, Local Television Transmission, DEMS and Multipoint Distribution (single channel and MMDS) Services are free to make as many of the specified minor modifications as they deem necessary, provided notice requirements are met, and as long as the cumulative affect of all such modifications effected within a 60-day period does not exceed the appropriate values specified in the Rules. The Educators profess that although the 60-day restriction may prevent an MMDS operator from using multiple minor modification applications to effect significant changes within any 60-day period, it does not preclude cumulative changes made over more than a 60-day period. Consequently, say the Educators, major changes could be made by MMDS operators using the minor facilities modification procedure, which would lead to harmful interference, prevention of system expansion and other negative effects on the ITFS service.

8. In order to prevent this harm, the Educators suggest that, in addition to the 30-day public notice period that they have proposed, procedures be adopted for the consideration of each modification application on its own mer-

its. Alternatively, the Educators recommend that specified limits be placed on the types and number of facilities changes that may be effected through a series of minor modification applications or minor amendments filed by MMDS operators.

9. Lastly, the Educators submit that although Section 21.902 of the Rules requires applicants seeking authority to make minor changes in their facilities to formally notify all existing and proposed ITFS licensees, permittees and applicants within 50 miles of the proposed MMDS facilities, there is no apparent sanction for violating this requirement. Therefore, the Educators contend that a penalty should be specified for MMDS operators who fail to meet their notification obligations. They ask that Section 21.902 be revised to state that in the event of a failure to serve, the Commission will dismiss a modification application or revoke a station authorization without prejudice.

10. The second petitioner, Microband, requests that we delete Section 21.38(b)(3), which requires prior Commission approval of the transfer of any vested or contingent interest in a licensee that, if executed, would result in the transfer of a controlling interest in the licensee to the grantee. This provision, says Microband, will unnecessarily delay the introduction of new services that utilize Part 21 facilities to the public. Microband argues that Section 21.38(b)(3) increases the paperwork burden of licensees and the Commission's staff, without any apparent public interest benefits.

11. Contingent interests are commonly used to secure performance by the grantor, states Microband, but rarely result in the actual transfer of control since they are seldom executed, and in those rare cases where the contingency does occur, Section 310(d) of the Communications Act mandates that Commission approval be obtained before actual control of a licensee is transferred. Microband argues that the need to acquire Commission approval before the conveyance of a contingent interest constitutes a radical alteration of Commission policy that will retard, if not foreclose, the introduction of innovative new services such as multiple channel wireless cable systems, which Microband says it is actively developing in several large, urban markets across the country. According to Microband, because of the attendent delays of the new review process, many lenders and investors will avoid long-term commitments to services such as wireless cable, and those that do lend or invest will demand a higher return for the use of their funds. Consequently, Microband concludes that Section 21.38(b)(3) will act as a barrier to the introduction of service offerings governed by Part 21 of the Rules, and it should therefore be abolished.

IV. DISCUSSION

12. We deny the Educators' petition for reconsideration. The procedural issues relating to Sections 21.41 and 21.42 were considered fully in the *Report and Order*.[4] There, several commenters suggested that a 30-day, rather than a 21-day, public notice period be adopted for minor modifications to Part 21 facilities. This suggestion was rejected. We determined that a 21-day public notice period afforded affected parties sufficient time to file objections, with attendant engineer analyses, to proposed technical changes made pursuant to Section 21.41 and that no public notice was necessary for the modifications permitted under Section 21.42. Some commenters in the proceeding also voiced their concern with our proposal to place no limit on the number of modifications enumerated in Sections 21.41 and 21.42, provided their cummulative effect does not exceed specified standards. They contended that these provisions would encourage licensees to make a series of small changes in their facilities in order to avoid the necessity of redoing their interference and coordination studies. We were not then, nor are we now, convinced that the 60-day cummulative effect provision will be used by Part 21 licensees to make major modifications to their stations without complying with the Commission's interference and coordination studies requirements. The changes authorized under Sections 21.41 and 21.42 have been permitted because they are unlikely to cause interference to other stations. Nevertheless, we specifically stated that should interference in excess of permissible levels to existing licensees occur after the commencement of operation of modified facilities, the interfering licensee would be required to cease operations and to make the necessary changes to eliminate such interference.[5] There was no evidence submitted there, and the Educators have submitted none here, indicating that abuse of the streamlined procedures is likely and, if it occurs, cannot be remedied by existing provisions.

13. Finally, we see no need to specify a particular penalty provision in Section 21.902 for licensees' failure to serve in a timely fashion all interested parties with copies of their minor modification applications. The Rules have general provisions in place for dealing with defective applications. *See* 47 C.F.R. §§ 21.13, 21.20 and 21.26. Other sanctions are also available, where appropriate. *See* 47 U.S.C. §§ 312 and 503. Again, we believe these provisions afford adequate incentive, not to just MMDS operators proposing minor modifications to their facilities, but to all Part 21 applicants, to comply fully with the Commission's requirements. There is no evidence that extraordinary steps are needed.

14. Microband's unopposed petition is granted. The underlying goal of the prior approval requirement of Section 21.38(b)(3) was to prevent a Part 21 licensee from accidentally or purposefully effecting an unauthorized *de facto* transfer of its authorization through the conveyance of unexecuted vested or contingent ownership interests. It does not appear, however, that retention of Section 21.38(b)(3) is necessary to achieve that goal, especially in light of its unforseen consequence of imparting burdensome regulatory delay. Although the Commission has strived to keep an applicant's requirements to a minimum, filing a transfer application nevertheless imposes unavoidable obligations upon both the applicant and the Commission's staff. An applicant must provide considerable information, as well as pay a filing fee, each time it tenders a transfer application. The application must thereafter be processed and reviewed before final action on it is taken by the Commission. The application process, therefore, necessitates the diversion of the applicant's and the Commission's resources. These expenses are incurred without a substantial countervailing benefit to the public, because, as Microband has pointed out, options are rarely exercised. Accordingly, the expense and effort expended would more than likely be for naught. Furthermore, the exercise of an option would probably take place much later than when it was entered into, and, because of the interim passage of time, it is quite likely that the facts that

were present originally would have changed, and, thus, require the submisssion of a new application with all of its attendant expenses.

15. Although Microband is the only Part 21 licensee to formally challenge Section 21.38(b)(3), the staff has received, from entities in virtually all of the Part 21 services, requests for waiver of the requirement since its adoption.[6] Review of the waiver requests reveals that licensees are fully aware of the need to acquire prior Commission approval, which is mandated by Section 310(d) of the Communications Act, before the consummation of any transaction that would change the party controlling affairs of the licensee or cause a change in the controlling ownership interest in a Commission licensee. In light of the substantial sanctions available to us in the event of an unauthorized *de facto* transfer of control in violation of Section 310(d),[7] we believe that sufficient deterents exist in this service, as with other services, against such events.[8]

16. It is now apparent that the public interest benefits expected from Section 21.38(b)(3) are outweighed by the burdens the rule has on Part 21 licensees, the processing staff, the users of Part 21 facilities and the public. Consequently, we believe that Section 21.38(b)(3) should be deleted from Part 21 of the Commission's Rules.

CONCLUSION

17. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the Educators IS DENIED.

18. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Microband IS GRANTED.

19. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 303(r), that Part 21 of Chapter 1 Title 47 of the Code of Federal Regulation IS AMENDED as specified in the Appendix below, effective **April 24, 1989.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 21 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 21 continues to read as follows:

AUTHORITY: §§ 21.1 to 21.910 issued under Sections 4 and 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. §§ 154, 303, unless otherwise noted.

2. Section 21.38 is amended by removing paragraph (b)(3).

FOOTNOTES

[1] Revision of Part 21 of the Commission's Rules, *Report and Order* CC Docket No. 86-128, 2 FCC Rcd 5713 (1987).

[2] The law firm of Pepper, Hamilton & Scheetz filed comments in support of Microband's petition.

[3] Section 21.41 provides that applications for specified minor facility modifications will be granted automatically on the twenty-first day following the date of public notice unless the applicant is otherwise notified. Section 21.42 allows other minor modifications to be made without any prior authorization. Section 21.902, which was not altered in this proceeding, requires Multipoint Distribution Service (MDS) applicants to make exceptional efforts to avoid harmful interference to other radio facilities, including serving potentially affected licensees, permittees and applicants with copies of interference studies required by the Commission.

[4] None of the Educators filed comments or participated in any way in the earlier stages of this proceeding.

[5] *Report and Order* at 5723 - 5724.

[6] *See, e.g.*, Letter to Chief, Domestic Radio Branch from counsel, Allnet Communications Services, Inc. (June 9, 1988); letter to Chief, Domestic Radio Branch from counsel, The Microband Companies Incorporated (April 22, 1988); letter to Chief, Domestic Radio Branch from counsel, Galesi Telecommunications, Inc. (February 16, 1988).

[7] *See, e.g.*, 47 U.S.C. § 312.

[8] We note that no similar requirement is imposed in other services.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989